Knoxville Bar Association

THE CONSIGLIERE

SUMMER 2010 Vol. 5, No. 3

"No man is above the law and no man is below it; nor do we ask any man's permission when we ask him to obey it."
-- Theodore D. Roosevelt (1858 - 1919)

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

- Call or e-mail Nick McCall at 632-4161 or nick.mccall@gmail.com 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

I hope this edition of *The Consigliere* finds everyone enjoying the end of this very hot 2010 summer. As we move into the second half of the year, it is worth noting that the Section has already had a lot of successes so far.

For starters, we have had two very good Quarterly Meetings. Our February meeting at Sobu was well attended and quite a bit more social than business. In fact, if it were not for the work attire, one would have thought it was simply a gathering of old friends. In May, we had a fantastic meeting at Altruda's. Stephanie Daniel, Vice President and legal counsel for Fifth Third Bank, discussed her experience with emerging issues in employment law. Stephanie did a wonderful job and we were all quite grateful that she took time out of her busy schedule to talk to us. Additionally, Nick McCall has produced two more stellar issues of *The Consigliere*. I can't stress enough how informative these publications have turned out to be.

As of the date I am drafting this letter, we are looking forward to our annual CLE on August 19, 2010, at Peerless Restaurant. The CLE Committee has once again done a great job arranging for this year's topic, *The Obama Administration's Policies and Their Impact on Corporations*. A wonderful group of speakers are set to discuss enforcement, taxes, and labor and employment issues under President Obama's policies. I encourage you to make every effort to attend this year, as the annual CLE has always been well attended and useful to the practitioner. Not to mention, Peerless Restaurant always makes the food worth the trip.

Our next Quarterly Meeting is at 6:00 PM on Tuesday, August 31, 2010 at Nama in Bearden. Nama is well qualified to host our group. On Tuesdays, they offer half-off their entire wine list with $4 drinks, and $2 beers, plus half-price appetizers in the bar area.

Thus, I am pleased to say this year is as strong as any for the Corporate Counsel Section. I can't thank my friends and colleagues enough that have helped make this group fun and rewarding. I am pleased to say we are seeing new faces at each event and that the word is getting out about not only the strengths of the Section, but also the good times we have as a group. If you have not attended an event, I highly encourage you to do so. Otherwise, we will be having all the fun without you.

Enjoy the rest of your summer!

-- *David Headrick*, Co-Chair

UPCOMING SECTION MEETINGS

Upcoming Section Meetings and Our Annual CLE Event

The KBA Corporate Counsel Section's quarterly meetings usually serve one of two purposes. Sometimes, our meetings are more formal, with a speaker(s) addressing topics relevant to most corporate counsel. But, because the offices of corporate counsel are spread throughout the greater Knoxville area and beyond, at other times the quarterly meetings are simply social gatherings which bring together members and guests in an informal setting.

Tuesday, August 31, 6:00 p.m.
Nama in Bearden
5130 Kingston Pike
(865) 588-9811

Tuesday, November 9 (*location to be announced*)

If you have specific questions about any of these meetings, feel free to contact our Membership Chair, Leo Beale, at 988-6063.For more information in general about the Section, please contact Co-Chairs Marcia Kilby at 362-1391 or David Headrick at 531-6440.

THE SECTION'S ANNUAL CLE

The Obama Administration's Policies and Their Impact on Corporations

Thursday, August 19, 2010

This program is designed for any attorney who works or wants to work with in-house corporate counsel and for all of those who serve as corporate counsel. The presentation will use a fast-paced, interactive format and will be loaded with practical advice and ethical considerations essential for effective service to corporate clients.

Time:
12:00 noon: Registration
12:15 - 4:30 p.m.: Luncheon & CLE Program

Location:
Peerless Restaurant, 318 N. Peters Road

Cost:
$90 KBA Members; $125 Non-KBA Members; $60 Law Students (additional fee for non-KBA member law students)

Labor and Employment

Speakers: Ronald G. Daves & Catherine E. Shuck, Wimberly Lawson Wright Daves & Jones, PLLC

- An Update on the Obama Administration's Labor-Friendly Initiatives
- A Look at Increased Enforcement by Wage & Hour and the EEOC, as well as the Recent Increase in Whistleblower Claims
- An Overview of the Employment-Related Provisions in the Patient Protection and Affordable Care Act

Taxes

Speakers: James B. Marting & Stephen A. Sherman, Stoll Keenon Ogden PLLC

- Corporate taxes
- Individual Taxes for Business Owners
- Ethical considerations/Tax Compliance

Enforcement

Speaker: **Edward C. O'Callaghan**, Nixon Peabody LLP

Changes in enforcement stance as compared to the previous administration, such as:

- Anti-trust
- Fraud and Abuse
- Public Companies

Register online at https://www.knoxbar.org/cle/index.php?form=viewproduct&pID=160 , or send a check to the KBA Office at P.O. Box 2027, Knoxville, TN 37901-2027.

TAX TIDBIT

Business Tax Provisions of the Health Care Reform Acts

By Bradley C. Sagraves

Woolf, McClane, Bright, Allen & Carpenter, PLLC

The passage of the Patient Protection & Affordable Care Act and the Health Care & Education Reconciliation Act of 2010 began a new era in health care coverage for individuals and families in the United States. The Acts require individuals to obtain health insurance either through employer plans, government plans, or to-be-created state health care insurance exchanges after January 1, 2014. Government premium subsidies are available to those that qualify for financial assistance. Although there has been a lot of

TAX TIDBIT:

Business Tax Aspects of the Health Care Reform Acts

discussion on the impact on individuals and families, businesses should be aware of the Acts' provisions to ensure that they comply with its provisions.

Although the Acts do not explicitly require businesses to offer health care coverage, they do create an excise tax for "large" businesses that fail to offer appropriate "minimum essential coverage" after January 1, 2014. The Acts define a "large" business as any employer that had at least 50 full-time employees on average during the prior calendar year. For purposes of the Acts, a full-time employee is defined as an employee that works an average of at least 30 hours per week. "Minimum essential coverage" includes Medicare, Medicaid, individuals plans, eligible employer sponsored plans and grandfathered plans. The employer will incur this excise tax if one of its employees receives a premium subsidy through a health care insurance exchange because the minimum essential coverage was too expensive, did not cover a high enough percentage of the health care costs, or because the employer did not offer health care coverage.

Calculating the excise tax depends on whether the employer offered no health care insurance or whether the minimum essential coverage was too expensive or did not cover a high enough percentage of health care costs. If the employer did not offer its employees health care coverage, the excise tax is equal to the number of full-time employees, minus 30, multiplied by 1/12 of $2,000 ($166.67) for each month that the employer did not offer health care coverage. If the employer had 50 employees and failed to offer health care coverage, its monthly penalty would be $3,333.40 (50 – 30 = 20 x $166.67). If the employer offered health care coverage but the cost to an employee exceeds 9.5% of household income or the plan paid less than 60% of the cost of benefits, then the penalty would be equal to 1/12 of $3,000 ($250) multiplied by the number of employees that are receiving the premium subsidy.

The excise taxes for employers offering some coverage are capped at the same amount that applies to employers that offer no health care coverage. If an employer has 50 employees and 15 of the employees receive a premium subsidy because the minimum essential coverage is too expensive or insufficient, the penalty would be capped at $3,333.40 per month instead of the original $3,750 (15 x 250). For some employers, these excise taxes might be cheaper than paying the costs of health care coverage for their employees.

Any business concerned about the excise taxes should remember a few very important points. First, any group health plan that had at least one individual enrolled in the plan on March 23, 2010, is grandfathered in under the "minimum essential coverage" definition and is permanently exempt from some requirements of the Acts. Second, the excise tax only applies if an employee obtains a premium subsidy through a health care insurance exchange. Third, the excise tax will apply to employers that already offer health care coverage whenever the cost of minimum essential coverage exceeds 9.5% of the employee's household income or if the employer plan's share of the total cost of benefits is under 60%. Planning for this portion of the excise tax might be impossible since household income can fluctuate above or below the 9.5% threshold during an employee's tenure with a company.

OUR FEATURE ARTICLE

The Unintentional Employer

By Jennifer Pearson Taylor, London & Amburn, P.C.

The U.S. District Court for the Western District of Tennessee recently reevaluated the distinction between employee and independent contractor under the auspices of the Fair Labor Standards Act. See *Lemaster v. Alternative Healthcare Solutions, Inc.,* ___ F.Supp.2d ___, 2010 WL 2570533 (M.D. Tenn. June 21, 2010).

The plaintiffs in *Lemaster* were licensed practical nurses ("LPNs") that had been hired by defendants Alternative Healthcare Solutions ("AHS") to staff long-term 24-hour in-home nursing care pursuant to a contract AHS had with Home Healthcare of Middle Tennessee, LLC ("HHC"). Plaintiffs entered into Independent Contractor Agreements ("ICAs") with a third defendant, Volunteer Staffing, Inc. ("VSI"). Plaintiffs were paid a single hourly rate for each hour worked, including work beyond 40 hours per week. Prompted by a complaint by one of the plaintiffs, a Department of Labor ("DOL") investigation determined that plaintiffs were employees of AHS, and not independent contractors. The DOL ordered AHS to pay back wages, but AHS refused. The DOL subsequently decided not to file suit on its own.

In granting the plaintiffs' motion for summary judgment and finding AHS and its individual owners liable as a matter of law for unpaid overtime wages to the plaintiffs, the District Court evaluated the facts of this case under the Sixth Circuit's "economic realities" test and the recent opinions of U.S. District Courts in the Middle District of Tennessee dealing with the same issue in a very similar factual context and both determined that LPNs, working in an arrangement similar to that of this case, were employees under the FLSA. See *Crouch v. Guardian Angel Nursing, Inc*., NO. 3:07-cv-00541, 2009 WL 3738095 (M.D. Tenn., Nov. 4, 2009); *Wilson v. Guardian Angel Nursing, Inc.*, No. 3:07-cv-0069, 2008 WL 2944661 (M.D. Tenn., July 31, 2008).

The "economic realities" test evaluates whether the worker is economically dependent upon the principal or is instead in business for himself. Importantly, the parties' contractual intentions do not control the issue of what relationship existed.

It is well-settled law in Tennessee that "[i]n determining whether the relationship between the general contractor and the subcontractor is that of employer-employee or general contractor-independent contractor, the factors to be considered are: (1) the right to control the conduct; (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; (7) the freedom to offer services to other entities." *Wilson v. Thompson Const. Co*., 86 S.W.3d 536, 541 (Tenn. Ct. App., 2001); *see also* Tenn. Code Ann. § 50-6-102(11). Although no single test has been held dispositive, the importance of the existence of a right to control the conduct of the work has been repeatedly emphasized. *Carver v. Sparta Elec. System*, 690 S.W.2d 218, 220 (Tenn. 1985).

FEATURE ARTICLE:

"The Unintentional Employer": The Employees vs. Independent Contractors Dichotomy (and the consequences)

In determining the *Lemaster* case, the district court considered six factors of its own delineation, which address and in some cases expand upon the traditional seven factors set forth in Tennessee case law:

(1) *Permanence of the Relationship between the Parties:*

The plaintiffs argued that the "somewhat transient nature" of LPNs, and the intrinsic lack of permanence in the industry does not weigh heavily on either side, because of the relatively low degree of transience actually experienced. Even the most transient plaintiff worked for defendants for over six months. This factor leaned "slightly in favor of an employment relationship."

(2) *Degree of Skill Required:*

Nothing reflected that plaintiffs were capable of finding their own patients, and thus, they were dependent on defendants for work assignments. Although LPNs are skilled workers, this factor leaned in favor of an employment relationship because their specialized skills were more of a "piece of a larger enterprise" rather than those characteristic of an independent contractor.

(3) *Extent of Plaintiffs' Investment in Equipment and Materials:*

Because the defendants' investment in the business of placing LPNs substantially outweighed the plaintiffs' investment in tools and equipment used in their work, this factor indicated an employment relationship to the Court.**1**

(4) *Plaintiff's Opportunity for Profit or Loss:*

Because all the plaintiffs were compensated at an hourly rate, their earnings were not tied to their performance; they had no opportunity for profit or loss beyond their set hourly wage. This factor indicated an employment relationship.

(5) *The Degree of Control over Plaintiff's Work:*

Although not much evidence existed in the record as to day-to-day operations, it was undisputed that defendants in *Lemaster* had control over the plaintiffs' work schedules, and required the plaintiffs to submit narrative reports of their activities to AHS. This factor weighted in favor of the plaintiffs being employees.

(6) *Integration:*

LPNs were central to the arrangements provided by AHS and, therefore, the plaintiffs were an integral part of the AHS business. However, with little information about AHS in the record, not much weight was given to this factor.

The district court went on to evaluate each individual defendant's liability under the Fair Labor Standards Act, but it is the court's analysis of the factors weighing in favor of an employment relationship rather than that of independent contractor that has the most potential impact on similar relationships across Tennessee. Not only can a business who believed itself to be operating with independent contractors be potentially liable for overtime compensation under the Fair Labor Standards Act, the potential for liability in other arenas is far reaching.

The distinction is critical for federal income tax purposes. For employees, the employer must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment taxes. 26 U.S.C. §3402.**[2]** An unwitting "employer" may also find themselves responsible for workers' compensation payments, unemployment benefits and the applicability of Title VII, ADA, ADEA and FMLA.

Additionally, in the area of tort law, Tennessee follows the general rule that an employer or general contractor is not ordinarily liable for the negligence of an independent contractor. *Potter v. Tucker*, 688 S.W.2d 833 (Tenn. Ct. App., 1985); *International Harvester Co. v. Sartain*, 222 S.W.2d 854 (Tenn. Ct. App., 1948). To hold an employer liable for the acts of an employee, a plaintiff must demonstrate that a "master-servant relationship existed between the wrongdoer and the employer at the time the injury occurred and with respect to the transaction out of which the injury arose." *Goodale v. Langenberg*, 243 S.W.3d 575, 582 (Tenn. Ct. App., 2007) (citing *Windford v. Hawissee Apartment Complex*, 812 S.W.2d 293, 296 (Tenn. Ct. App., 1991)

What does this opinion tell us? At the outset of a relationship many factors should be examined to determine whether a written agreement purported to create an independent contractor relationship will in fact meet the criteria for an employment relationship.

1 The court's analysis of this third factor is most interesting. AHS did not invest in any medical equipment or tools. However, following the Middle District's analysis in Crouch, this court decided to expand the scope of this factor and look at the defendants' investment in their own business itself. Because the defendants' investment in their own business outweighed the plaintiffs' investment in medical equipment used in their daily duties, the weight tipped in favor of an employment relationship. This is interesting reasoning because one would expect any business to be heavily invested in by its owners. It appears that both the principal and the worker need to have at least an equal investment in their respective businesses to weight in favor of an independent contractor relationship.

2 The IRS Revenue Rulings lay out 20 specific factors considered by the IRS when determining the relationship as either employer-employee or independent contractor. Many overlap with the factors used by Tennessee Courts. *Rev. Rul. 87-41, 1987-1 C.B., 1987 WL 419174 – Employment Status Under Section 530(D) of the Revenue Act of 1978.*

RANDOM NOTES

Compiled and Collected from Various Sources and Reports

Antitrust and Trade Regulation: Major Changes in Store to the Federal Horizontal Merger Guidelines

While an arcane area of practice, antitrust law often plays a prominent role in connection with corporate mergers and acquisitions and must be given significant attention by corporate lawyers if they do not wish to see a major transaction face federal challenge on antitrust grounds. For the first time in many years, the federal antitrust enforcement agencies--the Department of Justice and the Federal Trade Commission-- have proposed modifications to the guidelines used to assess when and how mergers among competitors should be challenged as being anti-competitive.

The Horizontal Merger Guidelines (the "Guidelines") have remained largely unchanged since 1992, being last revised in 1997. While only guidelines and not rules, these serve as an invaluable tool to analyze whether a proposed transaction violates Section 7 of the Clayton Act, which statute bars mergers that are likely to have anticompetitive consequences. With very few merger investigations leading to actual litigation rather than settlement, the DOJ's and FTC's application of the Guidelines to both Hart-Scott-Rodino Act ("HSR") pre-merger reviews as well as consummated mergers can define the battleground for merger analysis, as well as serving as crucial analytical points for other kinds of antitrust analysis. After holding a series of joint workshops, the DOJ and FTC announced their proposed revisions to the Guidelines on April 20, 2010.

The revised Guidelines move away from a formulaic evaluation focused largely on initial definitions of the relevant market and market concentration. Rather, they are more broadly stated to involve various factors designed to evaluate whether the actual or likely effect of a merger is to limit competition (e.g., observation of past pricing trends in the relevant or related industries). In this way, the revisions are intended to be a more accurate reflection of the actual, transaction-specific practices of the federal antitrust agencies in evaluating the competitive effects of both proposed and consummated mergers.

RANDOM NOTES:

Antitrust Law: Significant "Horizontal Merger Guidelines" Changes Are in Store from the DOJ and the FTC

The DOJ and FTC state that while defining a relevant market is still a useful tool in determining whether a planned or actual merger violates antitrust law, it is not a necessary starting point in the analysis of a merger, nor is it necessarily dispositive. Sometimes, the revised Guidelines note, identifying potential anticompetitive effects may be an appropriate first step even before defining a market. The revised Guidelines further note that a price increase for a group of products following a consummated merger may speak for itself regarding the anticompetitive effects of the merger, reducing the need to infer from evidence regarding market shares and definitions. However, they also note that when the antitrust agencies define a market, they will strive to define the smallest market possible for assessing anticompetitive effects, and may not include all conceivable substitutes.

Among other new substantive aspects are these:

- Additional emphasis on the increasingly utilized theory of unilateral effects, or competitive harm due to the size of the merged entity, stemming from a transaction. The revisions note that reductions in non-price variables such as product variety may raise concern, and they remove a presumed 35% market share "safe harbor" found in the existing Guidelines' discussion of unilateral effects theories.
- Clarifying "coordinated effects" theories, i.e., harm (whether accomplished directly or indirectly) due to increased concentration among competitors, including identification of risk factors such as past collusion, transparency of business dealings, product similarity, contract dynamics and other characteristics of demand and the relevant buyers in a product segment.
- Removal of the condition that timely entry to offset the anticompetitive impact of a deal must be able to occur within two years. Rather, entry must simply be "rapid." Study of past entry, or lack of entry, may be another source of relevant information.
- The addition of preventing the "entrench[ment]" of market power as a goal of the Guidelines (in addition to creation or enhancement of market

power). Along with comments about high margins evidencing collusion or a lack of price sensitivity among customers, these revisions signal increased attention on the activities of substantial market participants.

The DOJ and FTC described these changes in the revised Guidelines as giving companies considering a merger more insight into how the government considers whether to allege a transaction has led to or is likely to lead to a substantial lessening of competition. (Some have observed, however, that these new approaches may in fact make merger challenges less predictable, since the formal principles applicable to the evaluation now will involve many amorphous "factors" rather than focusing on defined calculations.) The revised Guidelines also go to great lengths to stress that the factors listed are not exhaustive and that the agencies will challenge a merger <u>at any time</u> it is determined that there has been, or may be, competitive harm from the transaction at issue.

The revised Guidelines also broaden the types of evidence that the FTC and DOJ can find useful in predicting the competitive effects of a merger. In addition to traditional market share and concentration analysis, the revised Guidelines acknowledge that customer comments, evidence of "natural experiments" in analogous contexts, an examination of head-to-head competition between the merging parties and whether one of the parties plays the role of a "maverick" competitor may be important to getting the full picture of likely anticompetitive effects. The revised Guidelines also note that ordinary business documents will be more probative than later-prepared merger advocacy materials. Explicit recognition of these sources of evidence is consistent with the agencies' practices and comports with the expansion of merger enforcement theories in the proposed revisions.

One notable amendment to the Guidelines is a revision of the statistical framework for evaluating the presumptive risk level of a transaction based on market concentration, the Herfindahl-Hirschman Index ("HHI"), used since 1982. The HHI thresholds in the current Guidelines have often been criticized as generating too many "false positives" and, in fact, the agencies have themselves released studies in recent years showing this to be true. Thus, the HHI thresholds in the revised Guidelines have been adjusted upward to better reflect how the agencies view market concentration as an indication of competitive concern. These thresholds are not meant as a "litmus test" for merger acceptability, but rather will be used by the DOJ and FTC only as one of many factors in evaluating a merger.

The revised Guidelines also note that when looking at consummated mergers—which have become increasingly common targets for both DOJ and FTC lawsuits—evidence of actual effects such as post-merger price increases and decreases in product variety and innovation will be considered. Finally, the agencies acknowledge that they may also consider the competitive effects on separate customer groups, as well as noting that (1) when competing buyers merge, there may also be anticompetitive effects; and (2) partial acquisitions can also be anticompetitive due to reduced competitive zeal, fears of coordination or excessive information-sharing.

The comment period ended on June 4, 2010. While the DOJ and FTC have explained that these revisions merely serve as codifications of the highly fact-specific approach they have used in practice over recent years, it still remains to be seen whether these changes may lay the groundwork for more aggressive merger enforcement. In any event, the revised Guidelines now provide more authority for an enhanced spectrum of merger challenges in an

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

Phone:
(865) 522-6522

Fax:
(865) 523-5662

E-mail Addresses:
dheadrick@terryadamslaw.com
mkilby@deroyal.com
nick.mccall@gmail.com
mwilson@knoxbar.org

We're on the Web!
http://www.knoxbar.org

era when the new leadership of the federal antitrust agencies have called for vigorous merger enforcement. These revisions thereby increase the need for, and ability of, parties and counsel to incorporate a variety of approaches into their merger planning, analysis and advocacy.

Read the revised Horizontal Merger Guidelines at:
http://www.ftc.gov/os/2010/04/100420hmg.pdf

NEWS AND NOTES

Thanks to Our Authors!

Thanks to all those who contributed to this issue of *THE CONSIGLIERE.* A very special note of appreciation is owed to our authors Brad Sagraves of Woolf, McClane, Bright, Allen & Carpenter, PLLC for the latest "Tax Tidbits" contribution on the significant business taxation implications of the recent health care reform legislation, and to Jennifer Pearson Taylor (with assistance from law clerk Ian McFarland) for her article on the recent Federal District Court decision exploring the employee-versus-independent contractor dichotomy and its potentially far-reaching implications for many employers under the federal Fair Labor Standards Act, other federal statutes, and the tax laws.

Want to see more articles? Want to see different topics addressed? Or, do you just want to tell us what you think of our newsletter? Contact the Editor (see "Contact Information" below) if you would like *The Consigliere* to address a specific topic or launch a periodic column, or if you want to volunteer to write a piece. Authors, ideas, topics and potential contributions are always welcomed by the Section's Editorial Staff.

CONTACT INFORMATION

See the contact information on the left-hand margin of this page. Use the hyperlinks to contact our Co-Chairs, David Headrick and Marcia Kilby; the Editor, Nick McCall; or the KBA's Executive Director, Marsha Wilson.

See the web site address at the bottom of the left-hand margin on this page to access the official Knoxville Bar Association web site.

A FRIENDLY PARTING REMINDER

Don't forget the Corporate Counsel Section's next quarterly meeting for this year, to be held at 6:00 p.m. on Tuesday, August 31, at Nama in Bearden--and our annual CLE on Thursday, August 19, noontime at The Peerless. See you there!