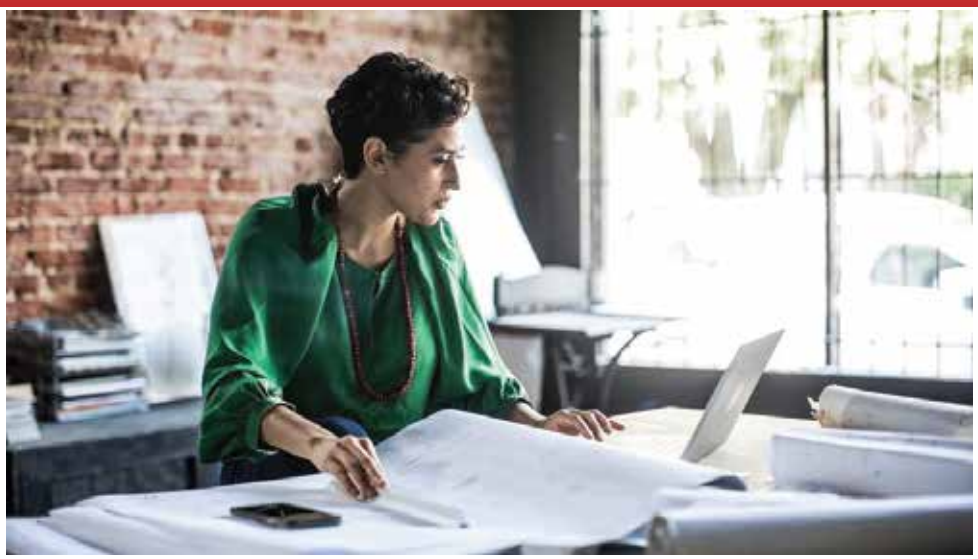
LEGAL PERSPECTIVES

ABRAHAMS KASLOW & CASSMAN LLP OMAHA'S BUSINESS LAW FIRM · FALL 2021

Expect the Biden DOL to Attack the use of Independent Contractors



BY HARVEY B. COOPER

Misclassification of employees as independent contractors has always been a problem for employers. The federal and state governments have long tried to find misclassification whether to protect worker rights or to maximize revenues to their treasuries. Now we fully expect the Biden Department of Labor ("DOL") to uptick the attack on misclassification.

There are multiple tests to determine proper classification. The DOL, Internal Revenue Service and state laws all have different tests, ranging from the right-to-control test to the economic realities test. This article addresses the DOL economic realities test.

The focus of the DOL economic realities test is on two core factors:

1. The nature and degree of control over the work; and
2. The worker's opportunity for profit or loss based on initiative and/or investment.

If either of these factors lean to finding misclassification as an independent contractor and not an employee relationship, the three following guidepost factors must also be examined:

1. The amount of skill required for the work;
2. The degree of permanence of the working relationship; and
3. Whether the work is part of an integrated unit of production.

Although no single factor is determinative, the DOL looks hard at whether the work is part of an integrated unit of production.

So, what can you do to protect yourself as an employer? First look for these red flags:

1. Engaging contractors to perform the same work as employees
2. Engaging contractors for full-time work over a long period of time
3. Prohibiting contractors from working for other companies
4. Treating contractors like employees
5. Controlling when, where or how the contractor performs the work

With those red flags in mind, here is a list of actions you can take to protect yourself:

1. Engage contractors through a third-party
2. Pay by the project, not by the hour
3. Enforce the contract, sure, but do nothing else
4. Never be a contractor's first or only customer
5. Audit your practices regularly, using the most difficult applicable test

If you have questions about misclassification, please contact Harvey at 402-392-1250 or by email at hcooper@akclaw.com.

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ENTITY SELECTION:

Forming a Partnership

BY ALEX J. MONTOYA

Whether a business owner or consumer, you've most likely encountered the multitude of acronyms that follow your favorite brands and organizations – Co., Inc., LLC, LP, PC, PLLC, etc. Despite their brevity, these acronyms embody the important business and legal decision of entity selection. Selecting the right legal entity is of the utmost importance because each entity has different rules, regulations, and practical implications for business operations. This article will be the first in a three-part series on entity selection, with each article addressing a different legal entity. To kick off the series, this article sets out some things to consider when forming a general partnership:

Formation

The first obstacle to entity selection is the formation process. General partnerships are unique in that they can be formed without any formality. In fact, they can be formed entirely inadvertently. A general partnership only requires "an association of two or more persons to carry on as co-owners a business for profit."

Operation

The second consideration is determining how the general partnership will operate. Though not required, a partnership agreement can guide the entity by dictating matters such as ownership division, allocation of profits and losses, management decision-making, and partnership duration. If there is no partnership agreement, default statutory rules will apply. Because of the low barriers to entry and flexible management structure, general partnerships can be an attractive option for individuals hoping to start a business with minimal start-up costs.

Liability

The next major consideration is liability protection. Unlike other entities formed through formal filings with the state, general partnerships do not provide any form of liability protection. Without liability protection the individual partners will be "jointly and severally" liable for the liabilities of and judgments against the partnership. In other words, the personal assets of the general partners are potentially exposed to creditors and claimants of the partnership if the partnership's assets are insufficient to satisfy the claims against it.

Tax

Another topic to address when selecting a legal entity with your attorney is tax. Unlike in corporations, there is no second layer of tax attributable to the partnership entity in the general partnership form. In general partnerships, the income and losses associated with the partnership's activities "pass through" to the individual partners who will then have to report their proportional share of partnership income on their individual tax returns.

As 2021 comes to end, the COVID-19 pandemic continues to highlight the unpredictability of life and business. If you select the wrong entity for your business, there could be consequences in connection with your overall financial health. Luckily, with proper planning, you and your attorney can ensure there is a healthy amount of separation between your personal life and professional endeavors.

Contact Alex at amontoya@akclaw.com to learn more about selecting the right entity for your business.

TO LITIGATE OR SETTLE??

BY JOSHUA R. BAUMANN

To litigate or settle? In other words; to fight or compromise? That is the main question when dealing with potential litigation. Whether someone injured you, you injured someone else, an insurance company denies your claim, a contract was breached, or you're faced with any one of the other various issues in the vast legal realm, it can be frustrating. But first and foremost, do you attempt to negotiate a settlement and compromise, or proceed with litigation?

The best answer is that it depends on many factors, including:

1. The parties' willingness to compromise;
2. The amount of money at stake;
3. The parties' principles; and
4. The facts of the case.

In the end, the decision-making on this issue is based on a cost-benefit analysis.

If you are dealing with a relatively straight-forward issue, it may be best to attempt to settle. For example, you may do so in a contract dispute where you rendered services on the basis of an agreement with the opposing party but have not been fully compensated for such services. If the amount of money at issue is nominal, you may want to avoid hiring an attorney and going through the entire litigation process only for your attorney fees to exceed the amount of money at issue.

Unfortunately, not all litigious matters are that straight-forward and, more often than not, receiving the expertise of an attorney is advisable. If you are fully prepared to go through the process of litigation, you must understand it can be costly, time consuming and emotionally draining. Sometimes trial is not the end of litigation. A decision by a jury or judge at trial may be appealed. If so, the process becomes longer, more costly, and more stressful.

If you decide you would rather compromise than battle it out at trial, have some comfort in knowing you are not alone as over 90-percent of cases settle. These cases can be settled pre-lawsuit or during the pre-trial timeframe. Quite a bit of strategy goes into determining the right time for settlement and negotiating a settlement. An attorney can assist with those matters and can also analyze whether a matter should be brought to trial.

Regardless of which side you are on, Abrahams Kaslow & Cassman has over 77 years of experience in helping clients navigate through the litigation process and strives to make the process as efficient and stress-free as possible. Please call Josh at 402.392.1250 or email him at jbaumann@akclaw.com to learn more.

LEAVING A LEGACY

Multigenerational Estate Planning

BY PAYTON HOSTENS

Leaving behind a legacy when you die is a common goal. To do so, individuals strive to provide financial security for their children, grandchildren, and the generations to come. However, creating a legacy takes more than setting a goal. Growing generational wealth requires thinking ahead, communication, and most importantly, an effective multigenerational estate plan.

Most estate plans focus solely on the next generation and fail to account for future generations. However, to build multigenerational wealth, the longevity of your fortune must be a priority in your estate planning. Your immediate heirs may still benefit from your financial legacy; but ultimately, your estate plan should serve as a guideline to direct the management of your assets for years to come, rather than leaving an instant windfall for the living heirs upon your death.

There are several things to consider when creating your multigenerational estate plan, including what estate planning tools will best serve your goals. Trusts, life insurance, 529 college savings accounts, and investment accounts are only a few vehicles available to accomplish estate planning goals. An effective multigenerational estate plan will likely utilize a combination of several estate planning tools. If properly executed, these tools can be used to reduce the impact of probate, taxation, and other risk issues, while maximizing the growth of your wealth.

A key component to ensure the success of a multigenerational estate plan is communication. If your goal is to preserve and grow your financial legacy, communicate your wishes to your heirs – likely your children. Your children should be prepared to take on the responsibility of managing the assets you will leave behind when you pass. It is important to give your children the opportunity to learn about financial matters and investing, the estate planning tools you put in place, and their role as executor and/or trustee. You may have the experience and knowledge to build wealth, but be sure to pass that experience and knowledge to your heirs before you pass away.

It should be noted that changes in the family or the occurrence of major life events can impact estate plans that have already been drafted. The birth of a child, marriage, and divorce are examples of events that may necessitate a second look at your estate plan. Your estate plan must be carefully drafted to ensure your wealth remains protected and generational wealth transfers are optimized even in the wake of major changes.

Building a legacy that truly outlives you is no small feat. Knowledge and expertise are invaluable additions to multigenerational estate planning. Abrahams Kaslow & Cassman LLP attorneys have over 77 years of estate planning experience. Consider discussing your goals with one of our estate planning attorneys to maximize the options available to you.

©OPYRIGHTING "WORKS"

BY ALEX J. MONTOYA

Whether installing security cameras or purchasing insurance, you probably do as much as you can to protect your business's physical assets from loss and theft. However, ensuring your assets are protected should not end with the physical assets of your business; it should extend to your business's intangible assets. There are various forms of intangible asset protection your business can employ, but one of the most important is copyright registration.

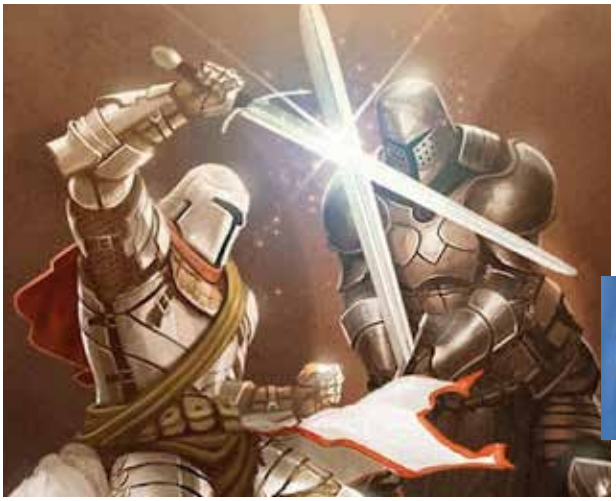
Before deciding whether copyright registration is right for your business's intangible assets, it is important to understand what types of "works" are protected under U.S. copyright law. Copyright protection exists in "original works of authorship fixed in any tangible medium of expression."

The first requirement is that the work must be original, meaning the work must be independently created and "possess at least some minimal degree of creativity." The second requirement is that the work must be an "original work of authorship." Under copyright law, "original works of authorship" include several forms of expression ranging from literary works to sculptures to sound recordings. However, the term does not extend to ideas, titles, slogans, procedures, processes, systems, methods, or discoveries. Finally, the work must be "fixed" to a tangible medium of expression, which means the work is in a sufficiently "permanent or stable manner" from which it can be "perceived, reproduced, or otherwise communicated, either directly or indirectly with the aid of a machine or device."

A copyright in a work means you have the exclusive right to reproduce the work, prepare derivative works based on the work, distribute the work to the public by sale or transfer, and display the work publicly. A copyright in a work automatically vests as soon as your work is affixed to a tangible form of expression. You can take advantage of these exclusive rights for the term of the copyrighted work's life, which is your life plus seventy years.

Despite automatically receiving these rights in your work at the moment it is fixed to a tangible form of expression, officially registering your work with the U.S. Copyright Office is an important step required to access all the rights and protections afforded under copyright law. Registration can be as easy as submitting an application to the U.S. Copyright Office alongside a sample of your work. Officially registering your copyright allows you to enforce exclusive rights through copyright infringement lawsuits. Under federal copyright law, no civil action for infringement of a copyrighted work can be instituted until the copyright is registered with the U.S. Copyright Office. Copyright registration also allows for the recovery of statutory damages and attorney's fees and creates an official record of your work and, therefore, a presumption of ownership. Presumed ownership may help expedite resolution of any potential infringement actions.

To learn more about protecting your business's intangible assets through copyright registration, contact Alex at amontoya@akclaw.com or call 402.392.1250.



Challenging the Validity of a Will

BY JULIE M. RYAN

A common question regarding the estate of a recently deceased person is whether he or she had executed a will. A will states how to dispose of a person's property upon death and usually appoints a personal representative to settle and distribute the estate. A will is a forward-looking instrument, meaning it is not operative until (1) the testator dies and (2) it is offered to and certified by the probate court as the last valid will of the decedent.

In Nebraska, any interested person (e.g., heirs, devisees, children, spouses, creditors, beneficiaries) can challenge a will that has been admitted for probate by filing a petition asking the court to prevent or set aside probate of the will being contested, to probate a different will, or to distribute the decedent's estate pursuant to intestacy statutes.

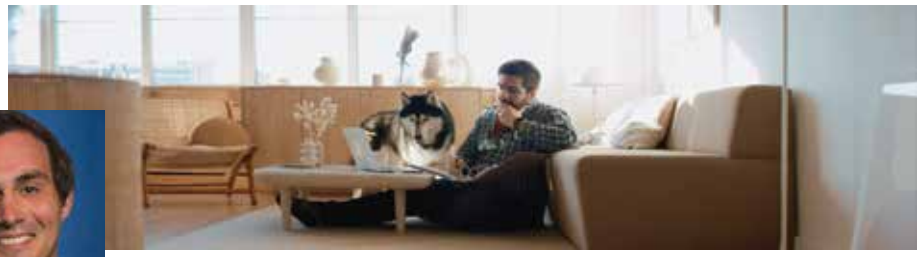
Will contest litigation is oftentimes expensive, emotionally taxing, and may extend for several years. Still, it can be worth pursuing when there are legitimate grounds for believing the will at issue is not valid and there is a large-value estate at stake.

Some legal grounds upon which will contests may be brought are as follows:

1. **Revocation**: The will was not the last-executed will of the decedent because it was revoked by a later-executed will or it was later-revoked by an act such as burning or tearing.
2. **Improper Execution**: With some exceptions, Nebraska law generally requires a will be in writing, signed by or at the direction of the testator, and signed by two individuals who witnessed the testator's signing of or acknowledgment of the will.
3. **Lack of Capacity**: To execute a will, a person must be over the age of 18 and be of sound mind with regard to their estate, their natural beneficiaries, their desired dispositions of assets, and their desired plan for disposition of property.
4. **Fraud/Forgery:** For example, a third party signed the testator's name to the will without the testator's knowledge or consent, or an incorrect or incomplete will was given to the testator for execution.
5. **Undue Influence:** The testator was subject to undue influence, there was an opportunity for the third party to exercise undue influence over the testator, there was a disposition to exercise such influence, and the third party's undue influence clearly led to the testator changing his or her estate plan in connection with the will at issue.
6. **Vagueness:** The will, or some portion of it, is too indefinite or uncertain to effectuate any testamentary purpose of a will.

This article is not meant to cover all legal issues concerning will contest litigation. Contact Julie at jryan@akclaw.com to learn more.

Can I pay employees less if they work remotely?



BY EVYN PERRY

Many employees have found working from home beneficial for reasons such as flexibility with childcare, a dislike for the traditional 8 a.m. to 5 p.m. workday, an opportunity to relocate to a city that is closer to family, a lower cost of living, or the ability to save money and time on things like commuting and dry cleaning.

Further, many employers are wondering if they can benefit from a remote workforce by paying employees less. Google is reducing an employee's pay if he or she is working from a remote location with a lower cost of living than the original job location, while JP Morgan said employees based out of their headquarters must work in the office to earn their full salaries.

On paper, reducing pay for remote employees due to a cost-of-living analysis makes sense for employers. However, it can cause several issues:

1. **Legal Ramifications.** A New York Times survey found that about 66% of women are responsible for childcare. Based on those numbers, it is possible female employees would prefer remote work to have flexibility with childcare. If a woman is being paid less than her male counterparts for doing the exact same job, the employer could be susceptible to equal pay act or gender discrimination lawsuits. Also, regardless of gender, an employee could feel slighted if he or she remains productive while working from home but is financially penalized for his or her remote work status. This puts employers at risk for wage and hour lawsuits.
2. **Culture Consequences**. Employers are saving costs with employees working remote from minor savings such as less money spent on breakroom coffee, paper, and office lunches to big savings from reduced or eliminated expenses for travel and commercial space. These cost-saving benefits to employers may be viewed negatively by an employee whose salary is reduced for working remotely. Employers are now faced with asking themselves, "How would lowering pay for remote employees affect my company's culture?"

The effects of the pandemic on the workforce are still in their infancy and only time will tell whether paying remote employees less is a safe bet. Along with contacting an employment attorney, businesses should consider the practical ramifications before making that decision. Please contact AKC law at 402.392.1250 if you would like to speak with one of our employment attorneys.