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WORKERS' COMPENSATION ALERT

TO: **Our Clients and Friends**

FROM: **Bleakley, Cypher, Parent, Warren & Quinn, P.C.**

RE: **Recent Supreme Court Order in the *Loos* case regarding Independent Contractors and the relevance of Tax Records and documentation; the RICO Act; and BCPWQ's 2010 Workers' Compensation Seminar Alert!**

DATE: **December 10, 2009**

As many of you are aware, the Michigan Supreme Court recently, held oral argument on November 4, 2009, in the case of *Loos v J.B. Installed Sales, Inc.*

The central issue before the court was whether income tax records are relevant to the issue of whether a claimant is an employee or independent contractor.

INDEPENDENT CONTRACTOR VS. EMPLOYEE AND THE RELEVANCE OF TAX DOCUMENTS

The issue of whether a claimant is an employee or independent contractor is often a hotly litigated topic and employers are often faced with the dilemma of whether to hire an employee or independent contractor to perform a particular service. Each, in its own right, has certain benefits and disadvantages. If you hire an employee, you may limit your legal liability to remedies provided in the Workers' Disability Compensation Act, but are strapped with burdensome benefit packages, human resource costs, and increased overhead. On the other hand, if you hire an independent contractor you may be able to reduce some of the cost associated with an employee, but you open yourself up to Circuit Court tort negligence action, which many feel presents a greater risk of damages.

Historically, an Economic Realities Test was utilized to determine whether an individual was an employee or independent contractor and it involved eight separate criteria; which was extremely difficult in application and by no means provided a bright line and litmus test.

In 1985, the legislature amended the definition of an employee in subsection 161(1)(n) and attempted to address the issue and clarify the exclusion of independent contractors from coverage under the Act. The amendment was analyzed by the Supreme Court and further enumerated with the Supreme Court's decision in *Reed v Yackell*, 473 Mich 520 (2005). The court went on to explain that section 161(1)(n) excludes from the definition of an employee any person who: 1) maintains his or her own business in relation

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to the service he or she provides the employer; 2) holds himself or herself out to the public to render the same service that he or she performed by the employer; and 3) is himself or herself an employee subject to the WDCA.

The Supreme Court specifically enumerated that in order to be considered an independent contractor, the person owning or operating a separate business must provide the same service that he or she performed for the employer. The individual who maintains a separate business and holds himself out to render service to the public, but does so in a broad undefined field of general labor, may not be considered an independent contractor if the services he performs for the employer are not identifiable as the most relevant aspects of the duties performed in the course of the employer's trade or business.

Some would interpret the Supreme Court's decision in *Reed* as a liberal and generous definition of employees. While the Supreme Court's decision in *Reed* did provide additional guidance regarding the application of 161 and the determination of whether an individual is an independent contractor, it did not set forth what additional factors are relevant when making the determination as to whether any of the three criteria set forth in section 161 have been met. It is important to remember that the ultimate decision has substantial impact on an employer's liability.

We are often faced with the scenario where an employer paid the individual with the issuance of a 1099, withheld no taxes, paid no fringe benefits, and further was not an integral part of the business, but the magistrate determined that the individual was an employee. Thus, the question arises in a great many cases as to whether income tax information is relevant to the inquiry of employee vs. independent contractor.

THE *LOOS* SUPREME COURT ORDER

By Order of the Supreme Court dated December 4, 2009, a majority of the court determined that **income tax records "are directly relevant to the question of employee status."**

While an order of the Supreme Court does not have the same precedential and binding effect on the lower courts as a full-fledged opinion of the court, it does provide guidance on the issue. The Workers' Compensation Appellate Commission and magistrates will utilize the court's order as guidance and will now pay particular attention to income tax documentation that is admitted as evidence.

While the utilization of a 1099 and/or other tax information designation is not determinative, the Supreme Court's Order makes it clear that the magistrate should consider tax record information when determining whether any of the three criteria contained in section 161(1)(n) are met and an independent contractor exists.

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The Supreme Court's Order also provides additional guidance for employers, at the outset, when they are making a determination as to the legal status of an individual they intend to hire. While the mere label "independent contractor" or a 1099 is not conclusive on the issue, employers can be reassured that their proactive steps to identify their legal liability and classify their employment relationships, are worth their efforts and will have impact down the road.

RICO ACT UPDATE

Previously, we informed you of a decision from the United States Court of Appeals that would allow for the possibility that an employee could sue (under the RICO Act) its employer, insurance company, Third Party administrator or defense expert for the fraudulent denial of workers' compensation benefits.

The case was appealed to the United States Supreme Court and the Court denied the employer's Certeori Petition (request to review the Court of Appeals decision).

The U.S. Supreme Court's refusal to review the case means that the court of appeals decision now stands for the proposition that employees denied benefits have the potential to file suit against the above named parties for violations under the RICO Act. The Rico act allows for treble damage liability and attorney fees if the plaintiff prevails. That prospect alone may attract a number of frivolous lawsuits.

WORKERS' COMPENSATION SEMINAR ALERT

The Law Firm of Bleakley, Cypher, Parent, Warren & Quinn, P.C., strives to provide the best legal services available with respect to workers' compensation matters in the State of Michigan. Consistent with that goal, we provide annual workers' compensation seminars. The seminars provide a valuable opportunity to network and obtain updates with respect to changes in workers' compensation law and administration of claims.

Our first 2010 seminar is scheduled in Grand Rapids, Michigan, on March 19, 2010. You will want to save the date on your calendars as our special guest key note speaker is New Chief Magistrate Christopher Ambrose. It is anticipated that he will provide us with unique perspective on the Worker's Compensation System, Board of Magistrates, and daily administration of claims. Formal invitations will be forthcoming, and you will not want to miss this experience. We look forward to seeing you on March 19, 2010.

As always, if you have any questions or concerns, please do not hesitate to contact any of the attorneys at Bleakley, Cypher, Parent, Warren & Quinn, P.C., directly.

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