

Trends in Employment Law for 2010 and Beyond

At least two areas of the employment relationship are seeing increased regulation and scrutiny in 2010:

The COBRA Subsidy

COBRA is a federal statute that allows certain employees to continue being insured under their employer's group health plan after their employment terminates. COBRA rights have been illusory, however, because terminated employees generally cannot afford the full premium for their health insurance. As a result, in February 2009 a 65% employer-paid COBRA subsidy was instituted as part of President Obama's American Recovery and Reinvestment Act of 2009 ("ARRA").

This subsidy originally applied to the period from September 1, 2008 through December 31, 2009, but was extended first through February 28, 2010, and again through March 31, 2010. The U.S. Senate recently voted to extend the subsidy a third time through December 31, 2010, which the House passed in December 2009. As President Obama is expected to sign this third extension into law, we believe the employer-paid COBRA subsidy will become a permanent entitlement.

Misclassification of Independent Contractors

Driven by a need for increased revenues, both the states and the federal government have been cracking down on employers who misclassify workers as independent contractors instead of employees. In fact, two branches of the federal government have targeted this issue with the hope of recouping more than \$7 billion in taxes over the next 10 years.

As discussed in greater detail later in this issue, the IRS has commenced a highly publicized National Research Program that will audit 6,000 employers and will focus, in part, on worker classifications. Similarly, the 2011 Labor Department Budget adds \$25 million to target misclassified workers. While properly classifying workers is beyond the scope of this article, almost every regulatory body views this issue based on who has "control" of how the work is performed.

Employment law continues to be Byzantine and complex, often leaving employers confused. CC&M's approach, however, is simple: To help make our clients' employment relationships positive and profitable.

Ross I. Molho



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Attorneys & Counselors

concentrating in

general business and corporate law
commercial litigation

business and succession planning for
family businesses, corporations and
limited liability companies

banking and finance matters

commercial real estate

estate planning, settlement and litigation

income, estate and gift tax

intellectual property matters

employment litigation and labor law

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FIRM HIGHLIGHTS

Steven A. Marderosian, with critical support from **Eric J. Ryan**, won a nearly \$100,000.00 DuPage County jury verdict in favor of CC&M corporate clients against their home builder.

Adisa Krupalija won final dismissal of a \$1,000,000.00 retaliatory discharge lawsuit by convincing the court that the claims had been waived under a \$10,000.00 settlement agreement.

Timothy M. McLean and **Gregory P. Adamo** won an appellate ruling in favor of a CC&M client commercial landlord, affirming their prior successful trial verdict in DuPage County.

Steven A. Marderosian and **Eric J. Ryan** won directed verdict at trial and over \$25,000.00 in legal fees against the buyer of a CC&M client's business who sued for over \$50,000.00 in damages.

Colleen M. Healy closed a business asset sale representing both the buyer and the seller, and also documented a commercial loan to close for a separate closely-held family business.

Mary E. Callow gave an Estate Plan presentation to the American Association of University Women (AAUW) at the Glen Ellyn Civic Center on February 3, 2010.

Every Word Matters

Navigating the World of Lease Enforcement

Two recent Illinois court rulings once again highlight the importance of every word in drafting leases and related notices.

Recovery of Attorneys' Fees

In *Housing Authority of Champaign County v. Lyles*, 918 N.E.2d 1276 (4th Dist. 2009), the trial court awarded \$5,089.50 in attorneys' fees to a tenant who defeated a landlord's claim for breach of a lease. Since the lease allowed only the party "enforcing" it to recover attorneys' fees, however, the Illinois Appellate Court reversed the award finding the attorneys' fees were not recoverable because they had been incurred "defending" a lawsuit by the landlord rather than "enforcing" the lease provisions.

To preserve the right to recover attorneys' fees against a tenant, a landlord thus should include the following language in its leases:

In the event of any Default by Tenant or in the event of any litigation arising under this Lease, Landlord shall be entitled to payment by Tenant of all costs and expenses (including reasonable attorneys' fees) incurred by Landlord in enforcing the terms of this Lease or in defending any claims by Tenant concerning this Lease, whether or not suit shall be required or commenced.

Five-Day Notices

Some landlords use outdated and improper five-day notices that state the landlord will terminate the lease if a default is not cured within the specified time. Instead of terminating the entire lease, a landlord **always** should notify a tenant that only the "right to possession" of the premises will be terminated if the rent default is not cured in time.

A recent ruling from the DuPage Circuit Court illustrates the devastating consequences an improperly worded five-day notice can have for a landlord. (DuPage County Case No. 07 CH 2404). In that case, the court ruled that a landlord cannot recover future rent from a tenant after sending a notice to terminate the *lease* rather than the *right to possession*. By sending an improperly worded Five-Day Notice, the landlord effectively waived its right to recover future rent for the many years that remained under the lease at issue.

Timothy M. McLean

Beware the IRS

Gearing Up for Comprehensive Employment Tax Audits

The IRS commenced its National Research Project for employment tax audits in February, 2010. IRS officials recently reported that employers can expect auditors to delve deeply into all aspects of their records and to review issues not often addressed in routine employment tax examinations. The National Research Project reportedly is intended to collect data for new employment tax audit selection formulas and improve audits over the long term, not to raise revenue from these particular taxpayers. And for the first time, the IRS will create

Discriminate Index Function (DIF) scoring for employment taxes as it already has for individual income taxes.

Employers of all sizes and categories (Corporation, S Corporation, LLC, tax exempt, and governmental) are candidates for random selection, although large and mid-sized businesses, tax exempt entities, and governmental filers reportedly will comprise only a small portion of the 6,000 total employers audited over the

project's 3 years. The IRS has scheduled 2,000 businesses for audits in 2010 and will notify employers by IRS Letter 3850-B that they are included in an audit of their 2008 taxes. The auditors will be required to address certain issues in every case: worker classification, fringe benefits, executive and officer compensation, backup withholding, and taxpayer identification number matters. Regular employment tax audits, which number about 60,000 annually, will continue.

IRS officials report that small business owners might face fringe benefits questions for the first time. The auditors also may inquire about deferred compensation plans and spousal travel. S corporation owners can expect auditors to examine whether owners are paying themselves too small a salary to avoid employment taxes. Worker classification also will be an issue. These employment tax audits could be a

precursor to a new wave of heightened IRS employment tax audit activity, particularly against small and mid-sized businesses. The IRS often targets these businesses because it perceives that they might be classifying employees as independent contractors and might not be complying with the host of new regulations governing deferred compensation, to cite just a couple examples.

Kenneth W. Clingen

Employers of all sizes and categories can expect auditors to delve deeply into all aspects of their records.

MORE FIRM HIGHLIGHTS

Colleen M. Healy, aided by paralegal **Virginia Wilkinson**, closed the sale of a rehabbed commercial property, and closed the sale of an industrial condominium despite a pending mechanic's lien and lawsuit.

Ross I. Molho and **Adisa Krupalija** convinced a plaintiff to accept a mere nuisance settlement of a FSLA federal court case in Chicago by vigorously opposing class action certification.

Steven A. Marderosian won final dismissal of \$40,000.00 in mechanics' lien claims against title-insured Lake County properties by proving the contractor failed to perfect its liens properly.

Eric J. Ryan defeated summary judgment to force a trial of a claim for over \$100,000.00 in damages and fees for unpaid commissions under the Illinois Sales Representative Act.

Ross I. Molho and **Adisa Krupalija** assisted New Jersey counsel to defeat a motion for summary judgment, forcing trial to proceed in federal court on an ERISA pension benefits case.

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This publication is intended for general information purposes only and does not constitute legal advice. Readers should not act upon information presented in this publication without individual professional counseling. Readers may consult with the attorneys at Clingen Callow & McLean, LLC to determine how laws, suggestions and illustrations contained in this publication apply to specific situations.

Clingen Callow & McLean, LLC

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Ross I. Molho, a partner at CC&M, concentrates his practice in labor and employment law. He is also

certified as a Senior Professional in Human Resources (SPHR).

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Every Word Matters — Navigating the World of Lease Enforcement

Timothy M. McLean, a partner at CC&M, concentrates his practice in business counseling, commercial litigation and landlord-tenant law.



Beware the IRS: Gearing Up for Comprehensive Employment Tax Audits

Kenneth W. Clingen, a partner in the firm, practices in the area of corporate law, mergers and acquisitions and estate and succession planning for business owners.