

To Classify as Independent Contractor, or Not

By David S. Rosenbaum

Effective January 1, 2012, an employer engaging in “willful misclassification” of an individual as an independent contractor is subject to civil penalties of up to \$25,000. Lab C §226.8. “Willful misclassification” is defined as “avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor.” Lab C §226.8(h)(4). An employer found liable for willful misclassification is required to post prominently on its website that it has “committed a serious violation of the law by engaging in the willful misclassification of employees.” Lab C §226.8(e). Contractors found liable for misclassification may be subject to disciplinary action by the Contractors’ State License Board. Lab C §226.8(d).

Anyone who, for compensation of any kind, knowingly advises an employer to misclassify an individual

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The ABC’s of Health Care Directives, part 1

By Robert D. Vale

Advance Health Care Directives, often referred to as Living Wills, Advance Medical Directives or Powers of Attorney for Health Care are important estate planning documents for individuals from 18 to 80 and beyond.

What is an Advance Health Care Directive?

In California, the Advance Health Care Directive is typically a “3-in-1” document.

In the **first** part, you identify person(s) to serve as your agent(s) to make medical decisions for you if your medical condition prevents you from making those decisions. For example, I arrive at the hospital unconscious, although my condition is not life ending. The physician determines that there are three alternate operative procedures that will correct my medical condition.

The ABC’s—Continued on page 2

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Referrals

Referrals constitute a majority of our business. If you have a family member, friend or co-worker that needs our assistance, please feel free to give them our number. Rest assured they will receive the same ingenuity, integrity, and common sense approach that you received.

Referrals are the greatest compliment we can receive.
Thank you!

Estate and Gift Tax Update

By Robert D. Vale

This year—until December 31, 2012, — unless Congress does something in the meantime, the Estate Tax Exemption amount and the Gift Tax Exemption amount is at a remarkable **\$5,120,000** per person. Yes, the exemption was indexed for inflation. Accordingly, this year, a decedent may pass, free of estate tax, at his or her death, or an

individual may gift, up to \$5,120,000 under the current Gift Tax Exemption. The exemption will sunset on December 31, 2012.

As of January 1, 2013, unless Congress changes things, the Estate Tax Exemption and Gift Tax Exemption will return to \$1 million and the effective maximum Estate Tax rate will return to 55%.

If you are in a position to make large gifts, you will want to consider doing so before the end of this year, 2012. To review the pluses and minuses of gifting this year and to learn of gifting strategies, please contact our office to schedule an appointment with either Brett or Bob.

Estate—Continued on page 4

Life can change in a moment... Is your financial future protected with a Personal Umbrella Liability Insurance policy?

By Brett S. Lytle

You've worked hard for what you have. Unfortunately, judgments amounting to thousands or even millions are being awarded by juries across the country in ever-increasing numbers. If you or a member of your household accidentally injure someone or damage their property, you could be the one sued. Even though your underlying auto and homeowner's insurance policies may provide substantial liability limits, it is not uncommon today for juries to award damages that exceed those limits.

your primary liability coverage. If you end up getting sued for an amount that's more than the primary liability coverage on your personal home, auto or other policy, you could have to pay out of pocket for the amount that exceeds your primary limit of liability -- unless you have a Personal Umbrella policy. Coverage amounts are written in increments of \$1 million and supplement your present policies; therefore, you are covered if the limits under your primary policy are used up. Your assets, as well as your future earnings, are protected.

that your assets also include your future earnings, home, other property, business interests and valuables. Depending where you live, what your driving record looks like and the number of underage drivers, a Personal Umbrella Liability Insurance policy can cost you as little as \$1 a day, and sometimes even less. Best of all, the additional protection can work with any existing personal liability insurance coverage. The value of a Personal Umbrella Liability Insurance policy is to provide higher amounts of liability coverage for an affordable premium.

It's your financial future... protect it with a Personal Umbrella Liability Insurance policy. ■

A Personal Umbrella Liability

Insurance policy acts as a second layer of liability coverage and sits on top of

In order to retain a Personal Umbrella Liability Insurance policy, insurance companies require that you maintain certain minimum amounts of primary liability insurance. When determining your coverage, take into account

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The physician will typically consult with my health care agent(s) on which one of the three procedures to employ.

In the **second** part, you make the "Advance Directive" to the physician who may be treating you in the future. In essence, you initial the box which best speaks of your desire for life sustaining treatment under a particular set of circumstances. Generally, if I arrive at the hospital unconscious, am examined by the physician, and a determination is made that my condition, is terminal, that I am not likely to recover from my condition and that, in the determination of the physicians, my life will end in a short period of time,

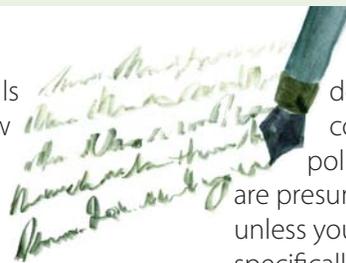
then my Directive tells the medical staff how I want things to go. The typical form allows for a "keep me comfortable" option and a "keep me going" option. Thus, when you complete your Directive, you are advising future health care providers how you want things to go. You are *not* leaving this crucial decision to the health care agent, your spouse or your children.

The **third** part of a typical Advance Health Care Directive is the election for organ and tissue donation. California and the other states are "opt in" states. That is to say, the potential donor, his or her health care agent and/or his or her family must opt to have organs or tissue

donated. Many European countries have "opt-out" policies. In those countries, you are presumed to be an organ donor unless you or your representatives specifically decline to donate.

If you have questions regarding Advance Health Care Directives please feel free to contact our office. You can obtain a blank Advance Health Care Directive by going to our website at www.mcdlawyers.net, click on "Resources," click on "Tools" then click on Estate Planning.

In our next edition of McDowall Times we will explore the uses of Physician Orders for Life Sustaining Treatment (POLST) and the pre-hospital Do Not Resuscitate Order (DNR). ■



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as an independent contractor may be held jointly and severally liable with the employer if the individual is found to be misclassified as an independent contractor. Lab C §2753(a). Labor Code §3353 defines “independent contractor” as “any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished.” This section requires that the common-law “control of work” test be used to determine whether a worker is an employee or independent contractor.

For purposes of California withholding taxes, an “employee” is a “resident individual who receives remuneration for services performed within or without this state or a nonresident individual who receives remuneration for services performed within this state.” Un Ins C §13004. This definition provides no criteria for distinguishing between an employee and independent contractor. Consequently, the courts apply the common-law rules for determining the existence of an employer-employee relationship.

The most important factor of which is the right of the principal to control the manner and means of accomplishing a desired result. If the principal has that right of control, an employer-employee relationship exists, even if the right is not exercised. “Strong” evidence of control is the principal’s right to discharge at will, without cause.

In addition to the new law, there are penalties for Misclassification. If the Internal Revenue Service or Employment Development Department determines that a worker should have been classified as an employee rather than an independent contractor, either may impose liabilities and penalty assessments.

An employer that erroneously classifies a worker as an independent contractor whom the California Labor Commissioner, the U.S. Department of Labor, or a court subsequently reclassifies as a non-exempt employee may be liable for (1) Minimum wage and overtime amounts the employer should have paid the employee; (2) Interest on unpaid minimum wage and overtime amounts; (3) A penalty for failure to pay the minimum wage (\$100 for each underpaid employee

for each pay period for which the employee is underpaid; and for any subsequent violation, \$250 for each underpaid employee for each pay period for which the employee is underpaid, regardless of whether the initial violation is intentionally committed); (4) A penalty of 25% of unpaid minimum wage and overtime amounts for failure to pay on time; (5) An additional penalty equal to the amount of the unpaid minimum wage and overtime amounts; and (6) Attorney fees and costs relating to the action.

Significantly, bankruptcy will not solve the misclassifying employer’s problems. Federal and state obligations for employment taxes and penalties (incurred up to three years before the filing of the bankruptcy petition) are not dischargeable in bankruptcy. One way to avoid the problem of misclassification of any person, whether it be exempt, non-exempt, or independent contractor is to invest in a legal audit. McDowall Cotter can help you with this audit. ■



Upcoming Events

Hot Lunch Tuesday

**So He “won’t be back,”
How to be an Employer Terminator**

**April 17, 11:30AM – 1:30PM
2070 Pioneer Court, San Mateo**

Termination of an employee is never fun. This hot lunch is intended to guide employers on how to conduct a “successful” termination with the goal of avoiding a later lawsuit.

Planning for a Loved One with Special Needs

**April 19, 3:00PM – 5:00PM
2070 Pioneer Court, San Mateo**

McDowall Cotter will be holding this seminar to answer many of the critical questions involved with planning for a person with special needs. Please invite anyone you know with children or parents with special needs.

What to do When a Loved One Dies

**April 24, 3:00PM – 5:00PM
2070 Pioneer Court, San Mateo**

You are invited to bring your family, friends and neighbors to learn more about what makes a good estate plan and how to prevent problems during a trust administration on incapacity or death.

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In the meantime, remember that the estate tax on property passing to a spouse, so long as that spouse is a US citizen, is deferred until the surviving spouse dies. Also, note that the annual exclusion amount -- the amount you can gift to another without filing a gift tax return -- remains at \$13,000 for 2012. Also note that the direct payment to a school for tuition and certain other school expenses and direct payment to a health care provider for medical expenses is not part of the annual exclusion amount. You must pay the school or the health care provider directly to ensure the payment will not be counted towards the annual exclusion amount. ■

A Common Sense Approach to the Practice of Law

McDowall Cotter has served clients in the greater San Francisco Bay Area for more than half a century. In that time, we have established a reputation, in the courts and in the community, for ingenuity, integrity and a common-sense approach to the practice of law.

It has been said that in some ways we are an old-fashioned law firm. We believe in civility, value long-term relationships, cultivate a healthy work environment, and provide the highest quality legal representation in matters large and small. And we agree—we are old-fashioned, but then again we've been old-fashioned for more than fifty years and still somehow we remain ahead of our time.

Our services include:

- Estate and Trust Planning
- Asset Protection and Wealth Preservation
- Probate and Trust Administration
- Will and Trust Contests
- Defense and Prosecution of Trustee Challenges
- Partition Actions
- Representing Businesses and Individuals in Civil Lawsuits
- Entity Planning and Formation
- Employer/Employee Relations
- Construction – Mechanics Liens
- Insurance Defense
- Public Entity Defense

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A common-sense approach to the practice of law.



Calendar of Events for 2012

April 17	11:30AM – 1:00PM	Hot Lunch Tuesday Topic: So He “won’t be back,” How to be an Employer Terminator
April 19	3:00PM – 5:00PM	Planning for a Loved One with Special Needs
April 24	3:00PM – 5:00PM	What to do When a Loved One Dies
May 8 & 9	8:30AM – 4:30PM	Needs Benefit Approach to Estate Planning
May 15	11:30AM – 1:00PM	Hot Lunch Tuesday
May 23	11:30AM – 1:00PM	Luncheon for Estate Planning Attorneys re Trust Administration Litigation
June 13	3:00PM – 5:00PM	Fun Event
June 19	11:30AM – 1:00PM	Hot Lunch Tuesday
June 20	3:00PM – 5:00PM	Medi-Cal: Planning for and Understanding Long-Term Care
July 11	3:00PM – 5:00PM	What to do When a Loved One Dies Maintenance Program Event Only
July 12	3:00PM – 5:00PM	What to do When a Loved One Dies
July 25 & 26	8:30AM – 4:30PM	Needs Benefit Approach to Estate Planning
September 18	11:30AM – 1:00PM	Hot Lunch Tuesday
September 21	1:00PM – 5:00PM	Ice Cream Social
September 25	3:00PM – 5:00PM	Planning for a Loved One with Special Needs
September 26	11:30AM – 1:00PM	Luncheon for Estate Planning Attorneys re Trust Administration Litigation
October 16	11:30AM – 1:00PM	Hot Lunch Tuesday
October 25	3:00PM – 5:00PM	What to do When a Loved One Dies
November 8 & 9	8:30AM – 4:30PM	Needs Benefit Approach to Estate Planning
November 13	3:00PM – 5:00PM	Fun Event Maintenance Members Event Only
November 15	3:00PM – 5:00PM	Tax Update
November 20	11:30AM – 1:00PM	Hot Lunch Tuesday
November 28	11:30AM – 1:00PM	Luncheon for Estate Planning Attorneys re Trust Administration Litigation
December 12	3:00PM – 5:00PM	Asset Protection
December 18	3:00PM – 5:00PM	Medi-Cal: Planning for and Understanding Long-Term Care

Seating is limited, so please RSVP to:

clientservices@mcclawyers.net or 650.572.7933, ask for Sylvia or Irene

Please check our website (www.mcclawyers.net) or look for an email for an update to our schedule