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— P.A. —
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Donald Peder Johnsen

Don Johnsen is a shareholder with the law firm of Gallagher & Kennedy, P.A., in Phoenix. He practices exclusively in the area of employment and labor law and civil litigation, counseling and representing management in such matters as employment discrimination and harassment claims, wrongful discharge claims, wage and hour disputes, employee hiring, discipline, and discharge procedures, drug and alcohol testing matters, arbitrations, restrictive covenants, and miscellaneous employment policy matters.

Don received his bachelor's degree from the University of Arizona (B.A. 1981). He received his law degree from the College of William & Mary (J.D. 1987), where he was Managing Editor of the William & Mary Law Review and a member of the Order of the Coif. After law school, he served as a judicial clerk to the late Hon. Clement F. Haynsworth, Jr., United States Court of Appeals for the Fourth Circuit. He is admitted to practice law in Arizona and Minnesota. He is a member of the Employment & Labor Law Section of the State Bar of Arizona, and a member of the Labor & Employment Law Section of the Minnesota State Bar Association. He has an "AV" rating from Martindale-Hubbell, and is listed in the 2007-11 editions of "The Best Lawyers in America" in its "Labor and Employment Law" category.

1. Employment Discrimination/Sexual Harassment.

- a. Representation of employers in charges of discrimination and harassment with the Equal Employment Opportunity Commission, the Arizona Civil Rights Division, and other agencies.
- b. Representation of employers in discrimination and harassment litigation in state and federal courts.

2. Wrongful Discharge.

- a. Counseling employers on employee discipline and discharge matters.
- b. Representation of employers in litigation in state and federal courts (wrongful discharge, breach of employment contract, breach of covenant of good faith and fair dealing, wrongful discharge in violation of public policy, intentional and negligent infliction of emotional distress, negligent hiring, retention, and supervision, defamation, invasion of privacy, and false imprisonment).

3. Miscellaneous Employment Matters.

- a. Review of employment applications and recruitment, interviewing, and hiring procedures.
- b. Counseling employers on drafting employment agreements and severance agreements.
- c. Counseling employers on negligent hiring, retention, and supervision issues.
- d. Review and interpretation of employee handbooks and policy manuals.
- e. Review and interpretation of personnel policies (absenteeism, vacation, sick leave, discipline, wage payment, etc.).
- f. Counseling employers on internal complaints and investigations.

4. Federal/State Workplace Regulation.

- a. Counseling employers on federal and state workplace regulatory compliance:
 - Fair Labor Standards Act (overtime and minimum wage matters, child labor matters)
 - Family & Medical Leave Act
 - Worker Adjustment Retraining & Notification Act (plant closing statute)
 - immigration matters
- b. Representation of employers in administrative claims before federal and state regulatory agencies.
- c. Representation of employers in civil litigation with federal and state regulatory agencies.
- d. Representation of employers in private civil actions by current and former employees.

5. Drug and Alcohol Testing.

- a. Counseling employers on development, implementation, and administration of drug and alcohol testing programs.
- b. Counseling employers on compliance with the Drug-Free Workplace Act.
- c. Counseling employers on compliance with state statutes and local ordinances regulating permissive workplace drug and alcohol testing.

- d. Counseling employers on compliance with the Omnibus Transportation Workplace Testing Act of 1991, requiring drug and alcohol testing.
- e. Representation of employers in litigation over drug and alcohol testing, including invasion of privacy claims.

6. Labor-Management Relations.

- a. Representation of employers in grievance arbitration proceedings.
- b. Representation of employers in unfair labor practice charges before the National Labor Relations Board.

7. Unemployment Compensation Claims.

- a. Counseling employers on claim adjudication procedure.
- b. Representation of employers in contested claim proceedings.
- c. Representation of employers in appeals of contested claims.

8. Non-Competition Agreements.

- a. Counseling employers on the development of agreements.
- b. Representation of employers in litigation to enforce agreements.
- c. Defense of employers in litigation over unenforceable agreements.

Pitfalls of Using "Independent Contractors"



Don Johnsen
Gallagher & Kennedy, P.A.
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1

Growth in use of "independent contractors"



- Control/reduce liability for overtime compensation
- Reduce payroll tax liability
- Reduce workers' compensation expense
- Operational flexibility

2

Risks and hazards of guessing wrong



- Years of back overtime compensation, plus double damages
- Years of back taxes, plus penalties and interest
- Direct liability for work-related injuries

3

Independent contractor or employee?

- Most courts and agencies use the same general factors to analyze whether the worker is an independent contractor or an employee

4

Independent contractor or employee?


- Most important factor:
 - The extent to which the principal exercises "control" over the manner and means by which the worker performs the service

5

Independent contractor or employee?

- Variety of factors
- Sliding scale or spectrum:
 - No one factor necessarily dictates the outcome
 - Courts and agencies will try to balance all factors to arrive at ultimate conclusion


6



IRS "20 factors" for analyzing "control" over the worker

- Amount of training provided by principal
- Principal gives instructions on when, where, how to provide service
- Degree to which work is integrated into principal's operations
- Necessity for worker to provide personal service


7



IRS "20 factors" for analyzing "control" over the worker

- Principal's control over worker's assistants/staff
- Continuity of relationship; work on regular recurring intervals
- Flexibility of worker's schedule
- Degree of full-time work


8



IRS "20 factors" for analyzing "control" over the worker

- Need for worker to perform services on principal's site
- Need to perform work in particular sequence with principal
- Requirement that worker submit reports
- Payment by hour, week, month, as opposed to by job

9



IRS "20 factors" for analyzing "control" over the worker

- Payment by principal of worker's travel and other expenses
- Principal provides tools and equipment
- Extent to which worker is invested in facilities, equipment, etc.
- Opportunity for worker to realize a profit or loss

10



IRS "20 factors" for analyzing "control" over the worker

- Worker's provision of service to multiple principals
- Worker's availability to the public
- Principal's right to terminate relationship at will
- Worker's right to terminate relationship at will

11



Common additional factors

- Terms of parties' written contract
- Worker eligibility for employee benefits
- Permanency of position

12



Common additional factors

- Worker's use of his or her own corporate form to provide services
- Worker's possession of licenses to perform services
- Level of skill required to perform services

13



Common additional factors

- Principal's treatment of other similar workers
- Practical integration into principal's operation
 - Office space
 - Dress/conduct codes
 - Inclusion in office events

14



Common mistakes

- "She signed a written independent contractor agreement!"
 - Written agreement does not control
 - Courts and agencies will analyze all of the factors and reach their own ultimate conclusion

15



Common mistakes

- "The job was for a specific, fixed term only!"
 - Need to differentiate between a true contractor and a temporary employee

16



Common mistakes

- "Everyone in this industry does it this way!"

17



Further questions?

18
