

*BUCKLEY KING*

# Legal Issues Regarding Staffing

Tests and the Rest Winter Conference

January 11-12, 2020

Presented by:

Matthew K. Seeley, Esq.

[www.buckleyking.com](http://www.buckleyking.com)

On time and on budget

# SCOPE OF PRESENTATION

- Independent Contractor vs. Employee
- Non-Compete and Non-Solicitation Issues
  - Florida
  - California
  - Ohio
- Trade Secrets and Applicable Law

# DISCLOSURE AND NON-REPRESENTATION

- I am not your lawyer and am not providing legal advice. This presentation is intended to provide a general overview of the topics discussed.
- I am licensed as an attorney only in the State of Ohio; therefore, any information regarding the law of other states is not as a practitioner in that state, but merely as a result of research on that state's common law and codified statutes.
- If you encounter an employment or staffing issue in the running of your business, or if you have any questions or require advice on any of the topics discussed in this presentation, you should not rely on any of the information provided herein.
- Instead, you should consult with an attorney who is licensed in the state in which you do business and who has experience and expertise in employment, non-compete and trade secret law in your state.

*BUCKLEY KING*

# INDEPENDENT CONTRACTOR VS. EMPLOYEE

## Overriding Distinction: Control

- The critical analysis in determining whether a member of your staff is an employee or an independent contractor (IC) is the level of control exerted by the business over the staff member (worker).
- The greater the level of control, the more likely it is that the worker will be treated as an employee for administrative and tax purposes.

# IRS CONSIDERATIONS

- **Behavioral**
  - Does the business control or have the right to control what the worker does and how the worker does the job?
- **Financial**
  - Does the business control the business aspects of the worker's job? These include arrangements such as how the worker is paid, whether expenses are reimbursed, and who provides tools and supplies.
- **Type of Relationship**
  - Is there a written contract or employee benefits such as a pension plan, insurance, or vacation pay? Will the relationship continue and is the work a key aspect of the business?

# IRS CONSIDERATIONS

- **IRS Form SS-8**
  - If there is any question or concern on behalf of the business owner or the worker as to status, either party may file IRS Form SS-8.
  - An SS-8 determination can, like most IRS decisions, take a significant amount of time to make – sometimes up to a year!
  - Form SS-8 can be found at: <https://www.irs.gov/pub/irs-pdf/ffs8.pdf>

# IRS CONSIDERATIONS

- **Impact of A Worker's Status**
  - Tax issues such as withholding taxes (e.g., Social Security and Medicare)
  - Labor (*i.e.*, union) and employment laws (ADA, FMLA, etc.) are applied differently, or not at all, depending on work status

# STATE CONSIDERATIONS

- States often have more stringent requirements than the IRS and other federal agencies;
- Ohio has 20 questions which are used to determine the status of a worker;
- A worker's status directly affects state tax, as well as his/her inclusion in state administrative programs including, unemployment compensation and workers' compensation coverage as well as any state law that mirrors a federal labor or employment program.



# REPERCUSSIONS OF MISIDENTIFICATION

- **FEDERAL**
  - No reasonable basis – personal liability for all unpaid withholding taxes.
  - Reasonable basis – Section 530 relief if certain obligations are met:
    - Filed all 1099s timely;
    - Similar situated workers are treated similarly;
    - Prove reasonable basis:
      - Consulted with and advised by a lawyer;
      - Similar industries treat workers as independent contractors;
      - Reasonable reliance on case law or IRS opinions and rulings.

*BUCKLEY KING*

# REPERCUSSIONS OF MISIDENTIFICATION

- **STATE**
  - Taxes;
  - Workers' compensation, unemployment compensation premiums and fines for unpaid years;
  - Wage and hour penalties and fines;
  - Retroactive entitlement to ERISA retirement and welfare plans;
  - Some states offer relief similar to IRS Section 530 relief, others do not.

# PROS/CONS OF INDEPENDENT CONTRACTOR STATUS

- **PROS for the ICs**

- **Flexibility**

- ICs can choose when, where and how often they work;
- Companies save administrative costs and time.

- **Taxes**

- 2017 Tax Act allows ICs to exclude **up to 20%** of their pass-through “Qualified Business Income.”
- Ohio, and other states, have similar provisions.

*BUCKLEY KING*

# PROS/CONS OF INDEPENDENT CONTRACTOR STATUS

- **CONS for the ICs**
  - Responsible for all tax reporting obligations and medical plan;
  - Cannot participate in unemployment or workers' compensation programs;
  - Responsible for downturns in work opportunities or injuries sustained on the job;
  - Cannot seek reimbursement for materials, travel expenses, or tools of the trade;
  - Must provide for their own retirement savings.

# PROS/CONS OF INDEPENDENT CONTRACTOR STATUS

- **PROS for the *Business***
  - Generally, the money saved by the business on benefits, administrative time and expense and tax obligations can, in part at least, be passed on to IC as payment for services provided.
  - Saves the business time, expense, labor and liability in handling administrative matters.

# PROS/CONS OF INDEPENDENT CONTRACTOR STATUS

- **CONS** for the *Business*
  - Inability to exert control over the worker.
  - Cannot require the worker to do a specific amount of work;
  - Cannot determine how the worker tutors or provides services to your clients/students;
  - Cannot tell a worker how to dress or how to present themselves.
  - Cannot tell a worker to use your business name, logo or intellectual property in providing services.

# NON-COMPETITION AND NON-SOLICITATION AGREEMENTS

- **Non-Competition Agreement**
  - A contract between a business and a worker which restricts the worker from competing with the business after the relationship ends;
  - Made in consideration for providing employment or payments to the worker;
  - Defines certain geographical areas for a certain period of time.

# NON-COMPETITION AND NON-SOLICITATION AGREEMENTS

- **Non-Solicitation Agreement**
  - Generally restricts a former worker from soliciting business from any current or former client or customer of his/her prior employer/contracting party.
- There is no federal statute or common law regarding non-competition or non-solicitation agreements (herein referred to collectively as “non-compete/s.”)
- All law is state-based; some states (like Ohio) have no statute and thus all the law is common law, *i.e.*, based on court decisions.
  - Some states are employer-friendly (Florida), some are employee-friendly (California), and some are neither (Ohio).
  - Always consult with a lawyer in your state if you have a question.



# FLORIDA – PRO EMPLOYER

(FLA. ST. §542.335)

- Non-Compete Agreements are not prohibited “so long as such contracts are reasonable in time, area, and line of business”
- A person seeking to enforce a Non-Compete “must plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant”
- Legitimate business interests include, but are not limited to:
  - Trade secrets
  - Valuable confidential information
  - Substantial relationships with customers, patients and clients
  - Goodwill
  - Extraordinary or specialized training

*BUCKLEY KING*

# FLORIDA – PRO EMPLOYER

(FLA. ST. §542.335)

- Contractual restrictions must be connected to the protection of legitimate business interests
  - A person seeking enforcement must prove “the contractually specified restraint is reasonably necessary to protect the legitimate interest...”
- **Criticisms of Pro-Employer Bias**
  - Most criticized provisions prevent consideration of the harm to the worker:
    - Statute states that “[i]n determining the enforceability of a restrictive covenant, a court **shall not consider** any individualized economic or hardship that might be caused to the person against whom enforcement is sought” (emphasis added)
    - Statute prohibits any rule of contract construction that “requires the court to construe a restrictive covenant narrowly, against the restraint, or the drafter of the contract”

*BUCKLEY KING*

# CALIFORNIA – PRO WORKER

(BUS. & PROF. CODE §16600)

- The relevant California Code, with very limited exception, prohibits any restraint on a worker's right to gainful employment; those exceptions being:
  - Current **employees** can be prohibited from working for other employees (such does NOT apply to independent contractors);
  - Partners and LLC members can agree among themselves not to compete should they sell their interest in the business, even if they are also employees of that business;
  - Non-competes associated with the sale of a business.

*BUCKLEY KING*

# OHIO – REASONABILITY AND MODIFIABLE

- **Tripartite test for determining reasonability**
  - No greater than required for the protection of the employer;
  - Does not impose undue hardship on the employee;
  - Is not injurious to the public.
- **Ohio’s “Reasonableness” Test**
  - “Permits courts to fashion a contract reasonable between the parties, in accord with their intention at the time of contracting, and enables them to evaluate all the factors comprising a reasonableness in the context of employee covenants.”
- Courts are permitted not only to strike, if divisible, the restrictive covenants in employment contracts, but were also permitted to rewrite and modify terms in order to fashion a reasonable agreement based on the facts and circumstances of the case.

# OHIO – REASONABILITY AND MODIFIABLE

- **Factors to Consider in Evaluating “Reasonableness”**
  - The absence or presence of limitation as to time and space
  - Whether employee represents the sole contact with customer
  - Whether employee possesses confidential information or trade secrets
  - Whether covenant seeks to eliminate competition which would be unfair to employer or merely seeks to eliminate ordinary competition
  - Whether covenant seeks to stifle the inherent skill and experience of employee
  - Whether the benefit to employer is disproportional to the detriment of employee
  - Whether covenant operates as a bar to employee’s sole means of support
  - Whether employee’s talent which employer seeks to suppress was actually developed during the period of employment
  - Whether the forbidden employment is merely incidental to the main employment

# TRADE SECRETS AND DTSA

- **Copyrights**

- Copyright all your created material;
- A simple © with your or your business's name is enough to protect your intellectual property;
- However, in order to bring a lawsuit for copyright infringement, your copyright must be registered with the U.S. Copyright Office;
- Copyright registration is beneficial as it gives you the right to claim costs, attorneys' fees and statutory damages should a lawsuit be initiated.

# TRADE SECRETS AND DTSA

- **Trade Secrets**
  - Can consist of information and may include a formula, pattern, compilation, program, device, method, technique, or process;
  - To meet the most common definition of a trade secret, it must be used in business, and give an opportunity to obtain an economic advantage over competitors who do not know or use it.

# TRADE SECRETS AND DTSA

- **Trade Secrets**

- A list of students or counselor contacts can arguably be considered a trade secret; however, a number of factors must be fulfilled:
  - The list cannot just be names, but must generally include five distinct categories: name, address, telephone number, school attended/working at, GPA/pervious test score, etc.
  - The list must be centrally maintained in order to clearly identify the information as business property.
  - Certain states find that if a worker creates his/her own list, such is not the business's property and thus not a protectable trade secret.



# TRADE SECRETS AND DTSA

- Trade Secrets

- If the information is generally known or easily ascertainable by the public, it is **not** a trade secret.
- The business must take reasonable steps to protect the confidentiality of the list.
- Freely giving the information out makes it less likely to be treated as a trade secret.

# TRADE SECRETS AND DTSA

- Trade Secrets

- Curricula can be trade secrets; however:
  - If you require an IC to use your curricula, such could be used to establish an element of control to qualify him/her as an employee;
  - Curricula created by employees in the course and scope of their employment are (with certain exceptions) your property unless there is an employment contract which specifically provides that the employee has ownership of such.
  - Curricula created by ICs are their property.
    - A way to protect this is to purchase the curriculum from the IC and have him/her agree to assign his/her rights to it to the business, and agree that such is a business trade secret which he/she cannot use for his or her own commercial benefit.

# TRADE SECRETS AND DTSA

- **Defend Trade Secrets Act of 2016 (DTSA)**  
18 U.S.C. §1832, et seq.
  - Creates a new federal cause of action for trade secret misappropriation;
  - Signed into law by President Obama on May 11, 2016;
  - Creates a uniform, federal standard for the protection of corporate trade secrets;
  - Companies operating in multiple states can seek relief for trade secret misappropriation without regard to differences in state laws;
  - Does not alter or circumvent state laws regarding enforceability of non-compete agreements;
  - Does not preempt state trade secret law, to the extent they provide greater protections.

# TRADE SECRETS AND DTSA

- **Defend Trade Secrets Act of 2016 (DTSA)**  
18 U.S.C. §1832, et seq.
  - Provides for the civil seizure of property “necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action” in “extraordinary circumstances;”
  - In addition to civil seizure, other traditional remedies are available including injunctions, compensatory damages, exemplary damages, and attorneys’ fees;
  - Exemplary damages are limited to two times the amount of compensatory damages and attorneys’ fees are only available upon proof that the misappropriation was “willful and malicious”;
  - A defendant may obtain attorneys’ fees against a plaintiff if the defendant can prove that the claim was brought in bad faith;

# TRADE SECRETS AND DTSA

- **Defend Trade Secrets Act of 2016 (DTSA)**  
18 U.S.C. §1832, et seq.
  - Provides immunity when the disclosure of trade secrets are made in confidence to a government official or to an attorney for the purpose of reporting or investigation a suspected violation of law, i.e. whistleblowing;
  - Requires that employers provide notice of the immunity provisions in “any contract or agreement with an employee that governs the use of trade secrets or other confidential information”.
    - Applicable to all agreements made, entered into, or updated after May 11, 2016
    - “Employee” is defined broadly to include “any individual performing work as a contractor or consultant for an employer”

# TRADE SECRETS AND DTSA

- **Defend Trade Secrets Act of 2016 (DTSA)**  
18 U.S.C. §1832, et seq.
  - If an employer fails to comply with the requirement, it can be awarded exemplary damages or attorneys' fees in an action against an employee to whom notice was not provided;
  - Congress' desire to align closely with the Uniform Trade Secrets Act which has been adopted in some form by nearly every U.S. state.

# Q AND A

For Additional Information

Matthew K. Seeley, Esq.

Buckley King LPA  
1400 Fifth Third Center  
600 Superior Avenue E  
Cleveland, OH 44114

[seeley@buckleyking.com](mailto:seeley@buckleyking.com)

216.363.1400

*BUCKLEY KING*