Contractor's SCHOOL, Inc.

Continuing Education for Contractors

Presenting Speaker's Information

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Employment Law Counseling, Training & Litigation

Breach of Contract
Discrimination & Harassment
Employee Medical Issues
FMLA
Occupational Health and Safety
Retaliation
Wage & Hour
Wrongful Discharge

Employment

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Elisabeth R. Blattner-Thompson is a shareholder and chair of the Employment Law department of Parsons Behle & Latimer. Her practice is primarily devoted to:

- Defending employers in employment-related disputes before administrative agencies and courts;
- Counseling employers on compliance with employment laws, both specifically as individual issues arise and generally through audits of employer policies, practices and procedures;
- Conducting training programs for all levels of employees and management; and
- Conducting workplace investigations.

Ms. Blattner-Thompson's expertise includes the areas of breach of contract, discrimination and harassment, employee medical issues, occupational health and safety, retaliation, wage and hour, workers' compensation and wrongful discharge.

Ms. Blattner-Thompson received a B.S. degree in economics, cum laude, from the University of Utah in 1985. She earned her J.D. degree with high honors from the University of Utah in 1988, where she was a William H. Leary Scholar, a co-recipient of the Edward W. Clyde Fellowship, Note and Development Editor of the Utah Law Review and was elected to Order of the Coif. She served as a judicial law clerk to the Honorable David K. Winder, United States District Court for the District of Utah from 1988 to 1989. Ms. Blattner-Thompson has been recognized repeatedly in *Utah Business* magazine as one of Utah's Legal Elite for her employment law expertise. For years,

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she has been recognized in *Chambers USA Client's Guide* as one of Utah's Leaders in employment law, has been listed in *The Best Lawyers in America* in labor and employment law and has been recognized in the *Mountain States Super Lawyers*. Throughout her career she has held Martindale-Hubbell's highest rating, an AV.

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Related Activities and Skills:

- Board Member, University of Utah International Center Advisory Board, 2006 to present
- Board of Directors, Alliance House, 2007 to present
- Member, Women President's Organization, 2005 to present
- Board of Trustees, Park City Jazz Foundation, 2002 to 2006
- American Bar Association, Labor & Employment Law Section and Litigation Section
- Salt Lake County Bar Association
- Women Lawyers of Utah, 1988 to present
- Fellow, Litigation Counsel of America

Education:

University of Utah (J.D., Order of the Coif, 1988)
University of Utah (B.S., cum laude, 1985)

Admissions:

- California State Bar, 2000
- United States District Court, District of Utah, 1988
- United States Court of Appeals, 10th Circuit
- Utah State Bar, 1988

Presentations and Publications:

Ms. Blattner-Thompson is a frequent public speaker on employment law topics. Some of her recent presentations are listed below:

Past Presentations On Managing Employee Medical Issues

- "Family and Military Family Leave Under the New FMLA," Salt Lake SHRM Legal Conference, May 12, 2009.
- "FMLA Leave After the National Defense Authorization Act and New FMLA Regulations," State and Federal Laws on Employee Leave, Vacations and Holidays in Utah, Lorman Education Services, April 1, 2009.
- "The New FMLA - Part I: Changes to What We Knew," Parsons Behle & Latimer 21st Annual Employment Law Seminar, March 17, 2009.
- "The New FMLA - Part II: Military Family Leave," Parsons Behle & Latimer 21st Annual Employment Law Seminar, March 17, 2009.
- "The New FMLA Regulations Have Arrived," Parsons Behle & Latimer Breakfast Briefings, December 5, 12 and 19, 2008.
- "Employment Law from A to Z: Handling Disability Leave," Lorman Education Services, October 4, 2007.
- "FMLA Basics and More," Ogden Department of Workforce Services, September 19, 2007.
- "Update on the FMLA," SHRM 2007 Crossroads Conference, September 12, 2007.
- "Mental Impairments and the ADA," Parsons Behle & Latimer 19th Annual Employment Law Seminar, May 3, 2007.
- "FMLA Troubles," Parsons Behle & Latimer 19th Annual Employment Law Seminar, May 3, 2007.
- "Managing the Crossroads of the ADA, FMLA and Workers' Compensation," Parsons Behle & Latimer 19th Annual Employment Law Seminar, May 3, 2007.
- "Mental Impairments and the ADA," Utah State Bar Employment Law Section. May 2, 2007.
- "The Family and Medical Leave Act in Utah," Lorman Education Services, April 3, 2007.
- "Now What??? Handling Complex ADA and FMLA Situations," The Employers Council 2006-2007 Legal Breakfast Series, January 23, 2007.
- "Advanced Topics in the Family & Medical Leave Act," Lorman Education Services, September 27, 2006.
- Family and Medical Leave Act in Utah, sponsored by Lorman Education Services, October 29, 2004, October 14, 2005.
- "ADA/FMLA Crossover What's an Employer to Do?," Salt Lake City & Tooele Employer Committee, November 17, 2004.
- "ADA Compliance," Utah Department of Workforce Services, Ogden, October 28, 2004.

- "Mental Impairments and the ADA," Parsons Behle & Latimer 16th Annual Employment Law Seminar, April 7, 2004.
- "Employee Medical Issues Update," HR Compliance, Are You Up To Date? Seminar, Lorman Education Services, January 23, 2004.
- "ADA Compliance," Utah Department of Workforce Services, Weber State University and the Ogden Weber Workforce Development Committee in partnership with the Northern Utah Human Resource Association, October 14, 2003.
- "Employee Medical Issues," Utah State and Federal Personnel Laws Seminar, Lorman Education Services, May 7 & 8, 2003.
- "Employee Medical Issues Update," HR Compliance, Are You Up To Date? Seminar, Lorman Education Services, January 31, 2003.

Past Presentations On Discrimination and Harassment

- "Handling Internal Complaints of Discrimination," EEOC Compliance in Utah, Lorman Education Services, February 6, 2009.
- "Compliance With Discrimination Laws," EEOC Compliance in Utah, Lorman Education Services, February 6, 2009.
- "Overview of Compliance With Major EEO Laws," EEOC Compliance in Utah, Lorman Education Services, February 6, 2009.
- "EEOC Compliance," Lorman Education Services, February 6, 2008.
- "EEOC Compliance," Lorman Education Services, February 28, 2008.
- "Employment Law from A to Z: Safely Terminating the High-Risk Employee," Lorman Education Services, October 4, 2007.
- "Actionable Harassment," Parsons Behle & Latimer 1st Annual Nevada Employment Law Seminar, June 17, 2005.
- "Sexual Harassment Training: How To Do It and Why," Utah State and Federal Personnel Laws Seminar, Lorman Education Services, May 7 & 8, 2003.
- "Employment Law Training - Why, What and How?" Parsons Behle & Latimer 15th Annual Employment Law Seminar, April 17, 2003.
- "Sexual Harassment Training: How to Do It and Why," State and Federal Personnel Laws in Utah, Lorman Education Services, May 16 & 17, 2002.
- "Sexual Harassment Training," Parsons Behle & Latimer 13th Annual Employment Law Seminar, April 2001.

Past Presentations On Other Employment Law Topics

- "Employment Law From 10,000 Feet," Vernal Chamber of Commerce, September 16, 2009.
- "Hot Topics in Utah Employment Law," Vernal Chamber of Commerce, September 16, 2009.
- "Political Change and What That Means For HR Professionals," Salt Lake SHRM Legal Conference, May 12, 2009.
- "Utah Employment Law Update," Parsons Behle & Latimer 21st Annual Employment Law Seminar, March 17, 2009.
- "Handling Discipline and Terminations," EEOC Compliance in Utah, Lorman Education Services, February 6, 2009.
- "HR Stuff," Utah Prosecution Council Government Civil Practice Conference, October 15-17, 2008.
- "Understanding and Complying With the Ever-Changing Employment and Labor Laws in Utah," Lorman Education Services, October 8, 2008.
- "Workplace Investigations," Lorman Education Services, July 11, 2008.
- "Time Off: State and Federal Laws on Employee Leaves, Vacations and Holidays," Lorman Education Services, April 10, 2008.
- "Utah Employment Law Update," Parsons Behle & Latimer 19th Annual Employment Law Seminar, May 3, 2007.
- "Making Employment Law Part of your Business Plan," Utah Governor's Economic Summit, March 22, 2007.
- "Employee Discharge and Documentation in Utah: Safely Terminating the High-Risk Employee," Lorman Education Services, September 13, 2006.
- "Think Like An Employment Lawyer:

An Interactive Discussion Of Six Real Life Workplace Scenarios," Lorman Education Services, August 24, 2006.

- "Advanced Workplace Investigations: How to Properly Conduct, Conclude and Document an Investigation," Lorman Education Services, March 21, 2006.
- "Safely Terminating the High-Risk Employee," Utah Employers' Council, December 6, 2005.
- "Employee Discharge and Documentation in Utah: Safely Terminating the High-Risk Employee," Lorman Education Services, September 15, 2005.
- "Employment Law From 10,000 Feet," Parsons Behle & Latimer 17th Annual Employment Law Seminar, April 13, 2005.
- "Working with Temporary, Leased and Part Time Employees," SHRM Technical Training Session, November 9, 2004.
- "FLSA Beyond The Basics," Intermountain Compensation and Benefits Association, Wednesday, May 14, 2003.
- "Safe Hiring Practices," Utah State and Federal Personnel Laws Seminar, Lorman Education Services, May 7 & 8, 2003.
- "Introduction to Employment and Labor Law," Employment Law Update Seminar, Lorman Education Services, December 11, 2002.
- "Employee Discharge and Documentation in Utah," Lorman Education Services, August 16, 2002.
- "Employment Law Issues," Counseling the Small Business Client in Utah, National Business Institute, March 2001.
- "Handling Temporary Hiring and Employment: Legal and Practical Issues with Temporary, Leased, Contracted and Part-time Workers," Parsons Behle & Latimer 10th Annual Employment Law Seminar, 1998.
- "Constructive Discharge Risks," Parsons Behle & Latimer 8th Annual Employment Law Seminar, 1996.

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EMPLOYMENT LAW FROM 10,000 FEET

Presented by Elisabeth Blattner-Thompson for the Contractor's School,

October 16, 2009

I have listed below for informational purposes the major employment law areas, and thereafter described the primary state and federal laws applicable in Utah in those areas. This list is not exhaustive; you should check with your own lawyer about the extent to which these laws are applicable to you and whether other laws might also be pertinent to your situation.

MAJOR EMPLOYMENT LAW AREAS

I. Equal Employment Opportunity Laws

II. Employee Medical Issue Laws

III. Pay & Benefits Issues

IV. Workplace Safety Issues

V. Right to Fire

VI. Miscellaneous Other Issues

DESCRIPTION OF THE PRIMARY EMPLOYMENT LAWS APPLICABLE IN UTAH

I. EQUAL EMPLOYMENT OPPORTUNITY ("EEO") LAWS

A. Title VII of the Civil Rights Act of 1964 (as amended) ("Title VII"), 42 U.S.C. § 2000e

1. Employer = public employer; private employer with 15 or more employees.

2. Prohibits discrimination on the basis of race, color, national origin, religion, gender, pregnancy.

3. Discrimination in any aspect of employment – hire, fire, pay, promotion, benefits, etc. Harassment is discrimination. Retaliation is discrimination.

4. Requires affirmative duty of reasonable accommodation of religious belief unless undue hardship.

5. Provides administrative remedy through EEOC and requires exhaustion of that as a prerequisite to suit in federal court.

B. Genetic Information Nondiscrimination Act of 2008 ("GINA"), H.R.493 [110th] (Amends Title VII)

1. Employer = public employer; private employer with 15 or more employees.

2. Employment nondiscrimination requirements become effective November 21, 2009.

3. Prohibits discrimination on the basis of genetic information and restricts the ability of employers and their health plans to require, collect or retain certain genetic information.

4. Imposes significant liability for violations of nondiscrimination and confidentiality requirements.

5. The EEOC has issued proposed regulations. Public comments were due by July 20, 2009, with final regulations to be adopted sometime thereafter. Highlights of the proposed regulations include:

a. Purpose. The employment nondiscrimination requirements prohibit use of genetic information in employment decision-making, restrict deliberate acquisition of genetic information, require that genetic information be maintained as a confidential medical record, and place strict limits on the disclosure of genetic information.

b. Definitions. The regulations confirm that "employee" includes applicants and former employees.

c. Prohibited Practices. Employers are prohibited from discriminating against an individual on the basis of genetic information in all aspects of employment. Employers are also barred from actions that may limit, segregate, or classify individuals because of genetic information in a way that might deprive them of employment opportunities. Disparate treatment claims are available, but disparate impact claims are not.

d. Acquisition of Genetic Information. An employer may not acquire genetic information except when an employer (1) inadvertently requests or requires genetic information of the individual or family member; (2) offers health or genetic services, including those offered as part of a voluntary wellness program; (3) requests family history to comply with the FMLA certification provisions or state or local family and medical leave laws; (4) acquires genetic information from documents that are commercially or publicly available for review or purchase; (5) acquires genetic information for use in genetic monitoring of the biological effects of toxic substances in the workplace; or (6) conducts DNA analysis for law enforcement purposes.

C. Equal Pay Act of 1963, 29 U.S.C. § 206(d)

1. Must give equal pay to men and women for equal work in the same establishment.

2. Equal work = work requiring substantially equal skill, effort and responsibility, performed under similar working conditions within the same establishment.

3. Provides administrative remedy through EEOC but DOES NOT require exhaustion of that as a prerequisite to suit in federal court.

D. Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 et seq., as amended by Americans with Disabilities Act Amendments Act of 2008 ("ADAA"), P.L. 110-325.

1. Employer = public employer; private employer with 15 or more employees.

2. Prohibits discrimination on the basis of disability.

3. Discrimination in any aspect of employment – hire, fire, pay, promotion, benefits, terms and conditions, etc. Harassment is discrimination. Retaliation is discrimination.

4. Requires affirmative duty of reasonable accommodation (see below).

5. Provides administrative remedy through EEOC and requires exhaustion of that as a prerequisite to suit in federal court.

E. Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 et seq.

1. Employer = public employer; private employer with 20 or more employees.

2. Prohibits discrimination on the basis of age if the employee is 40 or older.

3. Discrimination in any aspect of employment – hire, fire, pay, promotion, benefits, terms and conditions, etc. Harassment is discrimination. Retaliation is discrimination.

4. Provides administrative remedy through EEOC and requires exhaustion of that as a prerequisite to suit in federal court.

F. Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1324b.

1. Covered Employer = 4 or more employees for discrimination provisions; no size limit for I-9 requirement.

2. Prohibits discrimination on the basis of national origin and citizenship status, and prohibits document abuse.

3. Provides administrative remedy for discrimination through The Office of Special Counsel for Immigration-Related Unfair Employment Practices.

4. Requires employers to have I-9 forms timely completed on every employee; provides civil and criminal penalties for knowingly hiring or employing individuals not lawfully entitled to work in the U.S.

G. Utah Anti-Discrimination Act ("UADA"), Utah Code Ann. § 34A-5-101 et seq.

1. Employer = public employer; private employer with 15 or more employees.

2. Prohibits discrimination on the basis of race, color, national origin, religion, gender, pregnancy, age, handicap.

3. Discrimination in any aspect of employment – hire, fire, pay, promotion, benefits, terms and conditions, etc. Harassment is discrimination. Retaliation is discrimination.

4. Provides administrative remedy with Utah Labor Commission as exclusive remedy. Appeal rights to the Utah Court of Appeals.

H. Military Leave Laws

1. **Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. §§4301-4335.**

   a. Prohibits discrimination on the basis of veteran status.

   b. Requires affirmative duty of reemployment, and 2-year absence as accommodation for disability.

2. **Utah State Militia Act – Leave Provision, Utah Code Ann. § 39-1-36.** Prohibits an employer from denying military leave of up to 5 years to members of the armed forces reserves. Requires reinstatement to employment after leave with same seniority, status, pay and vacation as if he had not been absent. Class B misdemeanor.

II. EMPLOYEE MEDICAL ISSUE LAWS

A. Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 et seq., as amended by the Americans with Disabilities Act Amendments Act of 2008 ("ADAA"), P.L. 110-325.

1. Employer = public employer; private employer with 15 or more employees.

2. Protects qualified individuals with disabilities.

3. Disability = physical or mental impairment that substantially limits the individual in a major life activity, or having a record of such a disability, or being regarded as having such a disability.

4. Prohibits discrimination (see above).

5. Requires reasonable accommodation unless undue hardship or direct threat.

6. Provides administrative remedy through EEOC and requires exhaustion of that as a prerequisite to suit in federal court.

B. Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2600 et seq. & 29 C.F.R. § 825, as amended by the National Defense Authorization Act for FY 2008 ("NDAA"), P.L. 110-181.

1. Employer = public employer; private employer with 50 or more employees.

2. Requires 12 weeks of unpaid leave per year to eligible employees for: (1) bonding; (2) care for the serious health condition of the employee or his/her spouse, children or parents; and (3) qualifying exigencies.

3. Requires 26 weeks of unpaid leave in a 12 month period for the care for the serious illness or injury sustained in active duty by a covered service member who is the employee's spouse, parent, child or next of kin.

4. Requires maintenance of health coverage while on leave, and, unless the employee is a "key employee," reinstatement to the same or an equivalent position.

5. Eligible employees = worked for employer 12 months in the past 7 years, actually worked 1250 hours in last 12 calendar months, work within 75 miles of 50 employees, haven't used up their leave allotment.

6. Prohibits interference with employee's ability to exercise these rights.

7. Provides administrative remedy through the federal Wage & Hour Division of the Department of Labor but DOES NOT require exhaustion of that as a prerequisite to suit in federal court.

C. Utah Worker's Compensation Act, Utah Code Ann. § 34A-2-101 et seq.

1. Requires provision of workers compensation insurance to cover injuries sustained by Utah employees in the course and scope of employment.

2. Insurance will pay medical expenses and provides wages of 66 2/3% for temporary partial disability, and payouts for permanent disability.

3. "Exclusive remedy" rule: Bars negligence based lawsuits against employers and fellow servants.

   a. Before 2/13/2009 the "Lantz" intentional injury exception only applied in situations characterized by a *conscious and deliberate intent directed to the purpose of inflicting injury*.

   b. Helf v. Chevron U.S.A., Inc. (Utah, February 13, 2009) (alters the Lantz intentional injury exception; the new standard requires only "*a specific mental state in which the actor knew or expected that injury would be the consequence of his action.*")

D. Utah Occupational Disease Act, Utah Code Ann. § 34A-3-101 et seq.

1. Provides compensation for diseases or injuries to health sustained by a Utah employee in the course and scope of employment that is medically caused or aggravated by that employment. Last employer is liable if exposure in that employer's employment was a substantial contributing medical cause of the occupational disease and the employee was employed there for at least 12 consecutive months; otherwise apportioned based on fault.

III. PAY & BENEFITS ISSUES

A. Fair Labor Standards Act of 1938, as amended ("FLSA"), 29 U.S.C. § 201 et seq.

1. Almost every employer is covered (some special rules for some industries).

2. Requires payment of minimum wage.

3. Requires payment of overtime at 1 and ½ times the regular rate of pay for hours over 40 per week

4. Some employees may be "exempt" depending on their manner of pay and their specific duties.

5. Provides administrative remedy through the federal Wage & Hour Division of the Department of Labor, permits DOL to bring court action on employee's behalf. Private right of action is also available.

B. Lilly Ledbetter Fair Pay Act of 2009, P.L. 111-2.

1. Redefines an unlawful employment practice to change the timeframe for bringing claims of discrimination in compensation under Title VII, ADEA and ADA.

2. Timeframe used to run from the application of the discriminatory compensation decision or practice to the individual; timeframe now also runs from whenever an individual is affected by application of a discriminatory compensation decision or practice, to include every time wages, benefits, or other compensation is paid that results in whole or in part from the decision or practice.

C. Utah Wage & Hour Laws

1. Wages: **Utah Payment of Wages Act, Utah Code § 34-28-1 et seq.**

   a. Addresses paydays:

      (1) Employer must have regular and predetermined paydays at least semimonthly, except in the case of salaried employees who may be paid monthly.

      (2) Employers must pay within 10 days after the close of the pay period.

      (3) Employers must pay wages earned during the pay period on the day preceding the Saturday, Sunday or legal holiday.

      (4) Employer must supply on each payday a statement of any deductions made from wages.

      (5) Only certain deductions are lawful.

   b. Addresses separation from payroll:

      (1) Must pay all compensation earned within 24 hours of a firing, and on the next regular pay period in the case of resignation. This does not apply in the case of an employee paid by commissions.

   c. Addresses remedies.

2. Minimum Wage: **Utah Minimum Wage Act, Utah Code § 34-40-101 et seq.**

   a. Requires a minimum wage to be paid to certain employees in public and private employment within Utah, which wage may not exceed the federal minimum wage.

3. Overtime for Public Employees: **Utah Employment on Public Works Act**, **Utah Code § 34-30-8.**

   a. Requires payment of at least time and a half to covered employees for work exceeding 40 hours in one week.

4. Recordkeeping:

   a. **Utah Minimum Wage Act, Utah Code § 34-40-201.** Requires employers to keep payroll records for three years showing names, addresses, dates of birth, hours worked and wages paid to all covered employees.

   b. **Utah Employment Selection Procedures** Act, Utah Code §34-46-101 et seq. Prevents employers from asking for SSN, DOB and DL# information before giving a job offer or before starting the process to obtain a background check. Requires employer to have specific policy regarding retention, disposition , access and confidentiality of that information. Requires destruction of information after 2 years except to the extent otherwise required by law.

D. Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq.

1. Sets minimum standards for most voluntarily established pension and health plans in private industry.

2. Requires Plan to provide beneficiaries with certain information.

3. Imposes fiduciary duty on Plan to plan participants.

4. Requires certain claim denial and review procedures.

5. Exhaustion of those procedures is ordinarily required before proceeding to federal court.

6. Prohibits discrimination by employers because a plan participant has availed himself of an ERISA right, and discrimination to interfere with attainment of an ERISA right.

E. Consolidated Budget Reconciliation Act of 1986 ("COBRA"), as amended by the American Recovery and Reinvestment Act of 2009 ("ARRA").

1. Covers group health plans offered by employers with 20 or more employees.

2. Gives workers and their families who lose their health benefits the right to choose to continue group health benefits provided by their group health plan for 18 months (or 36 months if disabled) under certain circumstances such as voluntary or involuntary job loss, reduction in the hours worked, transition between jobs, death, divorce, and other life events.

3. Under COBRA, qualified individuals may be required to pay the entire premium for coverage up to 102 percent of the cost to the plan; under ARRA, assistance eligible individuals who are fired between September 1, 2008 and December 31, 2009 may not be required to pay more than 35% of the premium for coverage for up to 9 months.

4. Permits private right of action under ERISA's civil enforcement provisions.

F. Utah's Mini-COBRA Act, Utah Code § 31A-22-722.

1. Covers group health plans offered by employers with fewer than 20 employees.

2. Gives workers and their families who lose their health benefits the right to choose to continue group health benefits provided by their group health plan for up to six (6) months under certain circumstances such as voluntary or involuntary job loss, reduction in the hours worked, transition between jobs, death, divorce, and other life events.

3. Qualified individuals may be required to pay the entire premium for coverage up to 102 percent of the cost to the plan.

G. Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), P. L. 104-191, 45 C.F.R. § § 160 through 164.

1. Governs portability of medical coverage.

2. Governs privacy of medical information.

3. Applies to health plans, health care clearinghouses, and health care providers.

4. Provides administrative remedy through federal Health and Human Services Division's Office for Civil Rights.

5. Prohibits retaliation against anyone who files a complaint.

IV. WORKPLACE SAFETY ISSUES

A. Occupational Safety and Health Acts: Federal Occupational Safety and Health Act ("OSHA"), 29 U.S.C. § 654 et seq. & Utah Occupational Safety and Health Act ("UOSH"), Utah Code § 34A-6-101 et seq.

1. Requires employers to furnish employment, and a place of employment, free from recognized hazards that are causing or are likely to cause death or physical harm to the employees, and to otherwise comply with OSHA standards, including record keeping and reporting requirements.

B. Utah Drug and Alcohol Testing Act, Utah Code § 34-38-1 et seq.

1. Provides for fair and equitable testing of employees and prospective employees for drugs and alcohol as a condition of hiring or continued employment. States specific requirements for collection, testing, a written policy, disciplinary action, and confidentiality, and provides insulation from suit if firing is based on accurate test results.

C. Utah Indoor Clean Air Act, Utah Code § 26-38-1 et seq.

1. Requires employers who operate a workplace that is a place of public access or publicly owned building or office to forbid smoking other than in designated smoking areas. Requires employers who operate a workplace that is NOT a place of public access or publicly owned building or office to create a written smoking policy.

V. RIGHT TO FIRE ISSUES

A. At-Will Employment

1. The presumption in Utah is that an employment agreement that sets no specified term or duration is employment "at-will," which means that either the employer or the employee can terminate the employment relationship at any time, with or without notice, and with or without cause. This concept deals with contractual rights. It does not exempt the

employer from complying with other state or federal statutory or common laws, such as laws against discrimination.

B. Express and Implied Contracts

1. Employers can undo the at-will relationship by express or implied agreement that the employee will be employed for a set time, or that s/he will not be fired without cause, or fired only for certain causes.

2. Employers can create other contractual obligations about any terms or conditions of employment. Common ones concern leave, benefits, pay, and notice.

3. Contractual obligations can be created expressly or by implication in oral or written statements by supervisors or policies and procedures found in handbooks or otherwise.

4. All employment contracts have implied covenants of good faith and fair dealing.

C. Wrongful Discharge in Violation of Public Policy

1. An employer cannot fire an employee, even an "at-will" employee, in retaliation for taking, or to prevent him from taking, action in furtherance of a clear and substantial public policy.

D. Worker Adjustment and Retraining Notification Act of 1988 ("WARN") 29 U.S.C. 210l, et seq.

1. Requires employers with 100 or more employees (who work >20 hrs per week and not counting new hires) to provide notice 60 days in advance of covered plant closings and covered mass layoffs.

2. Exceptions to any notice: An employer does not need to give notice if a plant closing is the closing of a temporary facility, or if the closing or mass layoff is the result of the completion of a particular project or undertaking.

3. Exceptions to 60-day notice: (1) company is faltering (new capital or business has been sought in order to stay open and giving notice would ruin the opportunity to get the new capital or business, and applies only to plant closings); (2) unforeseeable business circumstances; and (3) natural disaster.

4. Employees may bring suit in federal court for violations.

VI. MISCELLANEOUS OTHER ISSUES

A. Other Torts

1. Negligent Hiring, Supervision, Etc. – Negligence by employer that contributed to employee harming another. Not barred by the exclusive remedy provision of the Worker's Compensation Act in the case of injuries to non-employees.

2. Tortious Interference with Economic Relations – Actions taken to interfere with economic relations (often future employment) by improper means or for an improper purpose.

3. Intentional Infliction of Emotional Distress – Intentionally causing extreme emotional distress. In rare cases not barred by the exclusive remedy provision of the Workers Compensation Act.

4. Invasion of Privacy – Employee expectations of privacy must be reasonable. Steps can be taken to eliminate the expectation.

    a. **Utah Employment Selection Procedures Act, Utah Code §34-46-101 et seq.** Prevents employers from asking for SSN, DOB and DL# information before giving a job offer or before starting the process to obtain a background check. Requires employer to have specific policy regarding retention, disposition, access and confidentiality of that information. Requires destruction of information after 2 years except to the extent otherwise required by law.

5. Restriction of Freedom - **Protection of Constitutionally Guaranteed Activities in Certain Private Venues,** Utah Senate Bill 78 (March 31, 2009). Overrules a Utah Supreme Court case, Hansen v. America Online, which affirmed AOL's right to fire employees who had hunting rifles in their trucks on AOL property. This Bill prohibits employers from creating or enforcing a policy that prohibits the storage of firearms in a motor vehicle parked on property owned, leased, or otherwise controlled by the person if: (1) the individual storing the firearm is legally entitled to possess and transport the firearm; (2) the vehicle is locked, or the firearm is in a locked container; and (3) the firearm is not in plain view.

    a. The Bill permits an employer to have a policy or rule placing limits on transport or storage if the employer provides in a reasonably proximate location, alternative parking for people who wish to keep firearms in their vehicles, or secured and monitored storage locations for the firearms outside of the secured parking area.

b. The Bill provides protections from civil liability in relation to occurrences that result from, are connected with, or are incidental to the use of a firearm that is properly stored or transported in a motor vehicle in association with this chapter.

c. The Bill provides equitable relief and damages, including punitive damages if a serious bodily injury or death result from violations of the Bill or the employer has previously been notified by the Attorney general that his rule violates this Bill.

d. There are a variety of exemptions in the Bill.

6. Defamation – False statements of fact that damage reputation.

a. Common law "common interest privilege" can protect employer who acts in good faith and does not over-publish.

b. **Employer Reference Immunity Act, Utah Code §34-42-1.** Protects employer who in good faith provides information about job performance, professional conduct, or evaluation of a current or former employee to a prospective employer at the request of the prospective employer.

B. Jury Duty

1. **Utah Jury and Witness Act, Utah Code Ann. § 78B-1-1 et seq and 116.** Prohibits an employer from discharging, threatening or taking any adverse action against an employee regarding his employment because of jury service. Forbids employer from requiring use of annual, vacation or sick leave to cover jury duty. Provides for fine, 6 months imprisonment, and civil action.

C. Unions

1. Union-membership: **Utah Labor Disputes Act, Utah Code § 34-19-1, et seq. and 13.** Renders void as against public policy any agreement between employees and employers whereby either party promises to join or remain, or NOT join or NOT remain, a member of some specific labor or employer organization, and/or promises to withdraw from an employment relationship in the event he joins or remains a member of some specific labor or employer organization.

2. Union-organizing: **Utah Employment Relations and Collective Bargaining Act, Utah Code § 34-20-1 et seq.** Expressly states the right of employees to self-organize, to form, join or assist labor organizations,

to bargain collectively, and to engage in concerted activities, and also states the employees' right to refrain from such things. Prohibits the employer from engaging in unfair labor practices.

D. Intellectual Property

1. Inventions: **Utah Employment Inventions Act, Utah Code § 34-39-1 et seq.** Outlines when agreements between and employee and employer are enforceable or unenforceable with respect to employment inventions.

2. Trade secrets: **Utah Uniform Trade Secrets Act, Utah Code § 13-24-1 et seq.** Permits an employer to seek an injunction for actual or threatened misappropriation of trade secrets.

E. Non-Competition

1. Non-compete agreements are generally disfavored in the law. To be valid, they must be reasonable in scope and duration and be calculated to protect the employer from *unfair* competition, not *fair* competition.

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Independent Contractor Or Employee

What's The Difference? Does it Matter?[1]

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I. INTRODUCTION.

The distinction between an employee and an independent contractor is often blurry and unclear. Courts look at a multiplicity of factors, weighing and assessing each factor differently on a case-by-case basis, to determine whether an individual is an employee or an independent contractor. Despite these difficulties, generally where the company/employer has the right to control and direct, not just the results of the work, but how and when the work is performed and by whom, there is an employer-employee relationship. In contrast, the hiring party does not control how an independent contractor performs his/her services, but pays for a certain outcome or result. Employers are sometimes tempted to classify a temporary or special employee as an independent contractor. However, if the classification is incorrect, the employer is at risk for owing unpaid taxes, benefits, and overtime. Additionally, the employer loses the protection of the "exclusive remedy" provision of the workers compensation law, and may thus be vulnerable to being sued by the independent contractor in the case of a work-related injury.

II. IRS TWENTY-FACTOR TEST.

Generally the relationship of employer and employee exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.

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[1] This paper has been prepared by lawyers at Parsons Behle & Latimer for informational purposes only and is not legal advice. Receipt of this information does not create an attorney-client relationship. Do not act upon this information without seeking professional counsel.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such a relationship exists, it is of no consequence that the employee is designated as a partner, co-adventurer, agent, independent contractor, or the like.

As an aid to determining whether an individual is an employee under the common law rules, twenty factors or elements have been identified as indicating whether sufficient control is present to establish an employer-employee relationship. The twenty factors have been developed based on an examination of cases and rulings considering whether an individual is an employee. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed.

1. **INSTRUCTIONS.** A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the RIGHT to require compliance with instructions. *See, e.g.*, Rev. Rul. 68-598, 1968-2 C.B. 464; Rev. Rul. 66-381, 1966-2 C.B. 449.

2. **TRAINING.** Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. *See* Rev. Rul. 70-630, 1970-2 C.B. 229.

3. **INTEGRATION.** Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. *See United States v. Silk*, 331 U.S. 704 (1947), 1947-2 C.B. 167.

4. **SERVICES RENDERED PERSONALLY.** If the Services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. *See* Rev. Rul.55-695 , 1955-2 C.B. 410.

5. **HIRING, SUPERVISING, AND PAYING ASSISTANTS.** If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment

of a result, this factor indicates an independent contractor status. *Compare* Rev. Rul. 63-115, 1963-1 C.B. 178, *with* Rev. Rul.55-593 1955-2 C.B. 610.

6. **CONTINUING RELATIONSHIP.** A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals. *See United States v. Silk.*

7. **SET HOURS OF WORK.** The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. *See* Rev. Rul. 73-591, 1973-2 C.B. 337.

8. **FULL TIME REQUIRED.** If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor on the other hand, is free to work when and for whom he or she chooses. *See* Rev. Rul. 56-694, 1956-2 C.B. 694.

9. **DOING WORK ON EMPLOYER'S PREMISES.** If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. *See* Rev. Rul.56-660 , 1956-2 C.B. 693. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. *See* Rev. Rul. 56-694.

10. **ORDER OR SEQUENCE SET.** If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so. *See* Rev. Rul.56-694.

11. **ORAL OR WRITTEN REPORTS.** A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. *See* Rev. Rul. 70-309, 1970-1 C.B. 199; Rev. Rul. 68-248, 1968-1 C.B. 431.

12. **PAYMENT BY HOUR, WEEK, MONTH.** Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on s straight commission generally indicates that the worker is an independent contractor. *See* Rev. Rul. 74-389, 1974-2 C.B. 330.

13. **PAYMENT OF BUSINESS AND/OR TRAVELING EXPENSES.** If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. *See* Rev. Rul. 55-144, 1955-1 C.B. 483.

14. **FURNISHING OF TOOLS AND MATERIALS.** The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. *See* Rev. Rul. 71-524, 1971-2 C.B. 346.

15. **SIGNIFICANT INVESTMENT.** If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship. *See* Rev. Rul. 71-524. Special scrutiny is required with respect to certain types of facilities, such as home offices.

16. **REALIZATION OF PROFIT OR LOSS.** A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. *See* Rev. Rul. 70-309. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.

17. **WORKING FOR MORE THAN ONE FIRM AT A TIME.** If a worker performs more than *de minimis* services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. *See* Rev. Rul. 70-572, 1970-2 C.B. 221. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

18. **MAKING SERVICE AVAILABLE TO GENERAL PUBLIC.** The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship. *See* Rev. Rul. 56-660.

19. **RIGHT TO DISCHARGE.** The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications. *See* Rev. Rul. 75-41, 1975-1 C.B. 323.

20. **RIGHT TO TERMINATE.** If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. *See* Rev. Rul. 70-309.

Rev. Rul. 87-41, 1987 1 Cum. Bul. 296.

Recently, the IRS reorganized the twenty factors into three broad categories which indicate the degree of control and independence: behavioral control, financial control, and the type of relationship of the parties. IRS Publication 15-A (2008). However, the IRS still relies on the twenty factors, and a thorough analysis to determine whether a worker was an independent contractor or employee would consider all twenty factors.

III. U.S. SUPREME COURT'S *DARDEN TEST.*

In Nationwide Mutual Insurance Co., v. Darden, 503 U.S. 318 (1992), the U.S. Supreme Court was faced with the question of whether an individual who operated his own insurance agency, who had several contracts with Nationwide Mutual Insurance under which he sold only Nationwide policies and Nationwide paid him commissions on his sales and enrolled him in a company retirement program, was an employee or an independent contractor. Darden was terminated by Nationwide and subsequently lost his retirement benefits because he violated his non-compete agreement when he began selling competing insurance policies. He sued Nationwide under ERISA, claiming that his retirement benefits were "vested" *employee* benefits and were guaranteed to him. The Supreme Court adopted

a "common law" test for determining who is an "employee" under ERISA, which it explained as follows:

> In determining whether a hired party is an employee under the general common law of agency, we consider (1) the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are (2) the skill required; (3) the source of the instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has a right to assign additional projects to the hired party; (7) the extent of the hired party's discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party.

The Supreme Court remanded the case back to the lower court to determine whether Darden was an employee under the Supreme Court's multi-factor test. While the Supreme Court did not decide the issue, it strongly implied that Darden was not an employee of Nationwide.

IV. THE TENTH CIRCUIT'S "ECONOMIC REALITIES" OR "HYBRID" TEST.

For the purpose of determining whether or not an individual is an employee or an independent contractor under federal anti-discrimination laws, the Tenth Circuit applies the "economic realities" or "hybrid" test:

> Under the hybrid test, the main focus of the court's inquiry is the employer's right to control the means and manner of the worker's performance. However, the hybrid test also looks at other factors, including: (1) the kind of occupation at issue, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the employer or the employee furnishes the equipment used and the place of work; (4) the length of the time the individual has worked; (5) the method of payment, whether by time or by job; (6) the manner in which the work relationship is terminated; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the employer; (9) whether the worker accumulates

> retirement benefits; (10) whether the employer pays social security taxes; and (11) the intention of the parties. No single factor is conclusive. Rather, the courts are to look at the totality of circumstances surrounding the working relationship between the parties.

Lambertsen v. Utah Dept. of Corrections, 79 F.3d 1024, 1028 (10th Cir. 1996); see also Trainor v. Apollo Metal Specialties, Inc., 318 F.3d 976, 980 (10th Cir. 2002) (same).

V. ANTI-DISCRIMINATION LAWS.

There are a number of anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964, the Age Discrimination In Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Utah Antidiscrimination Act, which apply to employers who have a certain minimum number of employees. For example, Title VII and the ADA provide the following definition of a covered employer:

> The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

42 U.S.C. § 12111(5)(A).

In light of the requirement that there be a certain minimum number of employees employed by a company for the company to be liable for discrimination under the antidiscrimination laws, there can be a dispute about whether certain individuals are employees or independent contractors or non-employee owners. With respect to the owner-employee issue, the Tenth Circuit has applied a three-factor test to determine whether a corporate officer or director is also a corporate employee:

> (1) Whether the director has undertaken traditional employee duties; (2) whether the director was regularly employed by a separate entity; and (3) whether the director reported to someone higher in the hierarchy. The primary consideration is whether an employer-employee relationship exists in which the director performs traditional employee duties.

Trainor 318 F.3d at 986. Thus, whether certain individuals are employees or some form of non-employee may determine the application of state and federal anti-discrimination laws.

While normally discrimination and harassment claims are asserted by employees against their employers under statutes that prohibit *employment* discrimination, another federal statute, known as "Section 1981," prohibits race and national origin discrimination in all "contractual relations." Section 1981 bars race and national origin discrimination in

"the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Because of the broad language of Section 1981, it prohibits hostile environment harassment as well as other forms of discrimination.

Section 1981 has long been applied to the employment setting because employment relationships are matters of contract, whether oral or written. Recently, a federal appeals court ruled that Section 1981 applies to independent contractors as well as to employees, and that independent contractors can assert race-based or national origin-based hostile environment harassment claims.

In *Denco, Inc. v. Wal-Mart Stores, Inc.*, a Hispanic independent contractor was hired to clean the parking lot of a Wal-Mart store. Over a period of months, the independent contractor was subjected to "white supremacy" graffiti and racial slurs, and was told by a manager, "I don't like your kind." After he was terminated, the independent contractor sued, claiming that he was forced to work in a racially hostile environment in violation of Section 1981. The jury awarded him $650,000, which the judge reduced to $300,000. The verdict was affirmed on appeal.

The *Denco* decision significantly expands the potential liability of companies for racial and national origin discrimination and harassment. Employers should now be aware that the conduct of their employees toward contractors (as well as toward other employees) can create costly legal problems. Minority employees and independent contractors can use Section 1981 to sue for discrimination and harassment against any company with which they have a contractual relationship. Finally, unlike Title VII, Section 1981 does not limit the amount of damages that can be recovered for harassment or discrimination.

VI. EMPLOYMENT TAXES

One risk to an employer in classifying a person as an independent contractor is the risk of owing employee taxes, interest and penalties in the event that the classification is determined to be incorrect. In a close case, state and federal agencies will readily believe that the employer improperly classified an individual as an independent contractor for the purpose of avoiding taxes and other obligations:

1. Federal Income Taxes not withheld.
2. State Income Taxes not withheld.
3. Social Security and Medicare contributions not withheld.
4. Federal Unemployment Tax Act ("FUTA") not withheld.
5. Workers Compensation Insurance not provided.
6. Overtime payments not made.
7. Employee benefits not provided.

VII. LOSS OF WORKERS COMPENSATION ACT PROTECTION FROM CIVIL LIABILITY TO EMPLOYEES.

Under the Workers Compensation Act of Utah and other states, employers are protected from civil liability in the event that an employee is injured in the course and scope of employment. An employee's sole remedy for such an injury is to receive workers compensation benefits, but employees are prohibited from suing their own employer for work-related injuries. This immunity or "bar" applies only to employees and only where the employer has workers compensation insurance. The Utah Workers Compensation Act provides:

> The right to recover compensation pursuant to this chapter for injuries sustained by an employee … shall be the exclusive remedy against the employer and shall be the exclusive remedy against any officer, agent, or employee of the employer and the liabilities of the employer imposed by this chapter shall be in place of any and all other civil liability whatsoever … to the employee or the employee's spouse, widow, children, parents, dependents, next of kin, heirs, personal representatives, guardian or any other person whatsoever, on account of any accident or injury or death, in any way contracted, sustained, aggravated, or incurred by the employee in the course of or because of or arising out of the employee's employment, and no action at law may be maintained against an employer or against any officer, agent, or employee of the employer based on any accident, injury, or death of an employee.

Utah Code Ann. § 34A-2-105(1).

> Employers who fail to comply with Section 34A-2-201 [requiring workers compensation insurance] are not entitled to the benefits of this chapter …, but shall be liable in a civil action to their employees for damages suffered by reason of personal injuries arising out of or in the course of employment caused by the wrongful act, negligent, or default of the employer …

Utah Code Ann. § 34A-2-207(1).

Thus, if an independent contractor is injured while working for the employer, he or she may sue the employer for the injuries suffered, and such a lawsuit would not be barred by the Workers Compensation Act, even though a lawsuit by an employee would be barred under identical circumstances.

VIII. MICROSOFT'S EXPERIENCE WITH INDEPENDENT CONTRACTORS

Microsoft employed "regular" employees, and provided them with a wide variety of benefits, including paid vacations, sick leave, holidays, short-term disability, group health and life insurance, pensions, a 401(k) Savings Plus Plan, and a stock-option Employees Stock Purchase Plan ("ESPP"). Under the ESPP, established in January 1986, employees could purchase company stock at 85% of market value through payroll deductions.

In addition, Microsoft supplemented its workforce with "independent contractors" or "freelancers," who did not receive any of the employee benefits provided to regular employees. These freelancers were hired when Microsoft needed to expand its workforce to meet the demands of new product schedules. These freelancers worked in a variety of jobs, including software testers, production editors, proof readers, formatters and indexers. The freelancers were fully integrated into Microsoft's workforce:

> They often worked on teams along with regular employees, sharing the same supervisors, performing identical functions, and working the same core hours. Because Microsoft required that they work on site, they received admittance card keys, office equipment and supplies from the company.

Vizcaino v. Microsoft Corp., 97 F.3d 1187, 1190 (9th Cir. 1996). Microsoft attempted to maintain certain distinctions between regular employees and freelancers:

> Freelancers wore badges of a different color, had different electronic-mail addresses, and attended less formal orientation than that provided to regular employees. … [T]hey were not paid through Microsoft's payroll department. Instead, they submitted invoices for their services, documenting their hours and the projects on which they worked, and were paid through the accounts receivable department.

Id. Further, Microsoft had all freelancers sign "Microsoft Corporation Independent Contractor Agreements," under which they agreed to be "responsible for all federal and state taxes, withholding, social security, insurance and other benefits." The freelancers also received a document that stated: "as an Independent Contractor to Microsoft, you are self-employed and are responsible to pay all your own insurance and benefits." Id.

In 1989 the IRS audited Microsoft's employment records to determine whether the company was complying with federal tax laws. Applying its 20-factor test, the IRS concluded that Microsoft's independent contractors/freelancers were not independent contractors but employees for withholding and employment tax purposes. The IRS reached this conclusion because "Microsoft either exercised, or retained the right to exercise, direction over the services performed" by the so-called freelancers. Id. at 1191 n.2. The

IRS required Microsoft thereafter to pay withholding taxes and the employer's portion of FICA taxes. Microsoft agreed to pay overdue employer withholding taxes and to issue retroactive W-2 forms to allow the freelancers to recover Microsoft's share of FICA taxes, which they had previously been required to pay. Microsoft also agreed to pay freelancers retroactively for any overtime they had worked.

In response to the IRS audit and rulings, Microsoft "converted" its freelancers to "temps," working for a new temporary employment agency, which provided payroll services, withheld federal taxes, and paid the employer's portion of FICA taxes. If the freelancers did not agree to be "converted" to temps, they were discharged.

In 1993 a number of former freelancers initiated a class action lawsuit against Microsoft, claiming that all freelancers since 1987 were entitled to the employee benefits Microsoft offered to "regular" employees, including 401(k) SPP benefits and ESPP stock-option benefits. In a series of three decisions between 1996 and 2002, the Ninth Circuit Court of Appeals ruled in favor of the plaintiffs and against Microsoft on all issues. Despite the Independent Contractor Agreements signed by the freelancers, the court ruled that the freelancers were entitled to employee benefits, including stock options, because they were in fact employees, not independent contractors. Further, the court ruled that the plaintiffs continued to be Microsoft employees even after they were "converted" to "temps" of a temporary employment agency. The court applied a five-factor test, which emphasized recruitment, training, the duration of employment, the right to assign additional work, and control over the relationship between the "temps" and the agency. Based on this five-factor test, the court concluded that Microsoft remained the employer (along with the temporary employment agency) and that the "temps" were entitled to employee benefits.

In addition to its settlement with the IRS, Microsoft settled the class action lawsuit after almost nine years of litigation by agreeing to:

> (1) Hire over 3,000 class members as W-2 employees entitled to employee benefits, which had an estimated cost of $101.5 million for 1999-2001 alone, and

(2) Pay $97 million into a trust fund to reimburse class members for stock-option and other benefits as well as for attorneys fees and legal costs. $27 million was paid to the plaintiffs' attorneys out of the trust fund.