



## DOUMAR LAW GROUP NEWSLETTER

A Periodic Publication Covering Legal Issues of General Interest

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**AUGUST 2006**

### **Employees v. Contractors**

Many businesses treat part-time or occasional personnel as independent contractors, for whom tax withholding need not occur. In Revenue Ruling 87-41, the IRS proffered a balancing test based on control over a worker, regular hours, and other factors, to determine whether a worker is treated as an independent contractor or an employee. This distinction has become an issue for clients after contractors were terminated and then brought claims for overtime or unpaid wages as an employee, under the Fair Labor Standards Act (FLSA), or for unemployment compensation. If an employee prevails, attorneys' fees are mandatory under the FLSA. Just because an employer treats someone as an independent contractor does not mean the courts (or the IRS) will automatically recognize such treatment.

### **ERISA Claims**

Disputed claims for insurance benefits through an employee plan are subject to ERISA, which preempts state common law. For employers, this means that plan administrators have tremendous discretion in making benefit determinations and that employers

generally cannot be sued over benefit determinations if employer plans are structured correctly. For employees, this means that employers and insurers sometimes overstep themselves in broadly denying claims, and appeals can be worthwhile.

### **Parallel Litigation Strategies**

We have been involved in the last year in many cases where multiple litigations are pending among the same parties in different parts of Virginia, or in different states, or even in different countries. These can be nightmare scenarios. If you or your company files a lawsuit, prepare for your adversary to retaliate by filing against you in another jurisdiction if possible. Filing first can still be advantageous. Transfers or stays are possible. Sometimes a retaliatory suit may be essentially frivolous and burn itself out. Recently a 12-count complaint filed against our client was dismissed after nearly a year, vindicating a passive approach designed simply to defend all avenues of attack and slow things down. In another case, strong motions to dismiss filed by multiple defendants, including our client, convinced the plaintiff company to flee and litigate out-of-state where some parties had previously filed.