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# Pennsylvania Unemployment Compensation Newsletter

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## *RECENT APPELLATE DECISIONS OF NOTE*

### "INDEPENDENT CONTRACTOR" OR "EMPLOYEE"??

In order to rebut the presumption that an individual working for wages is an employee eligible for unemployment compensation benefits, the employer must demonstrate, among other things, that the claimant was free from control and direction in the performance of his work and that the claimant was customarily engaged in an independently established business while providing such services. Additionally, the following factors are relevant in determining whether an individual worked as an employee or as an independent contractor: 1) a fixed rate of remuneration; 2) withholding of payroll taxes; 3) supplying tools for the individual; 4) supplying training to the individual; and 5) requiring that the individual attend regular meetings. While no one single factor is conclusive, the courts look to the entire relationship to determine whether the requisite control exists to establish an employer-employee relationship. Donald R. Tracy v. Unemployment Compensation Board of Review, No. 2098 C.D. 2010, Filed June 21, 2011.

### IMPACT OF SIDELINE BUSINESS ON RECEIPT OF UNEMPLOYMENT COMPENSATION

Laurence Kress was a licensed attorney who engaged in a sideline legal practice both before and while employed by a law firm. He was then laid off by the firm, but continued his sideline practice while seeking full-time employment with a firm. In awarding Mr. Kress unemployment compensation benefits, the Commonwealth Court noted: *"Under §402(h) of the Law, an employee who engages in self-employment is ineligible for benefits unless (1) the self-employment began prior to the termination of the employee's full-time employment; (2) the self-employment continued without substantial change after the termination; (3) the employee remained available for full-time employment; and (4) the self-employment was not the primary source of the employee's livelihood."* Because Mr. Kress' sideline practice met all four criteria, benefits were payable. Laurence C. Kress v. Unemployment Compensation Board of Review, No. 2500 C.D. 2010, Filed June 23, 2011.

### CLAIMANT'S DUE PROCESS RIGHTS INCLUDE RIGHT TO REFEREE'S ASSISTANCE

Under 34 Pa. Code §101.21, a pro se claimant is entitled to assistance from the Referee during the evidentiary hearing. 34 Pa. Code §101.21 provides:

> "Where a party is not represented by counsel the tribunal before whom the hearing is being held should advise him as to his rights, *aid him in examining and cross-examining witnesses, and give him every assistance* compatible with the impartial discharge of its official duties."

The Commonwealth Court has interpreted this section as meaning that, in addition to advising pro se claimants of their rights and aiding them in questioning witnesses, referees should reasonably assist pro se claimants to elicit facts that are probative for their case. Mark A. Hackler v. Unemployment Compensation Board of Review, 2490 C.D. 2010, Filed July 15, 2011. *Editor's Note:* While this case involves an unrepresented claimant, the same ruling should apply to an unrepresented employer. Often, however, employers are expected to be more "business savvy" and should not rely upon the Referee to develop their case.

### "INDEPENDENT CONTRACTOR" REVISITED

Looking once again to distinguish between an "employee" and an "independent contractor," the Commonwealth Court reiterated the Supreme Court's adoption of 3 key factors in the case of Danielle Viktor, Ltd. v. Dept. of Labor & Industry, Bureau of Employer Tax Operation, 586 Pa. 196, 892 A.2d 781 (2006):

1. Whether the individual is able to work for more than one entity;
2. Whether the individual depends on the existence of the presumed employer for ongoing work; and,
3. Whether the individual was hired on a job-to-job basis and could refuse any assignment.

These 3 factors are to be considered in addition to the primary indicator of an independent contractor, i.e., whether an individual has been and will continue to be free from control or direction over the performance of such services

both under his contract of service and in fact. Patricia Gill, d/b/a Interstate Installation v. Department of Labor & Industry, Office of Unemployment Compensation Tax Services, No. 1698 C.D. 2010, Filed August 4, 2011.

**ATTEMPTING TO BORROW MONEY FROM SUBORDINATES CONSTITUTES WILLFUL MISCONDUCT**

Jeffrey Weingard was employed as a distribution specialist by the American Red Cross when he was fired for attempting to borrow money from his supervisor and five subordinates. While the employer did not have a policy which addressed loans from or to subordinates or stating that requesting such loans would be grounds for termination, the UC Service Center and the Unemployment Compensation Board of Review found claimant's conduct fell below the reasonable standards of behavior that an employer has a right to expect of its employees. As such, benefits were denied. The Commonwealth Court agreed, stating claimant "*used his position of authority in an unseemly way. He may not have used overt threats or direct coercion, but that fact is not dispositive of the issue. Claimant held the upper hand in the relationship with the employees he supervised. His request for a loan made at least one employee uncomfortable enough to report claimant's request to claimant's supervisor. There is unspoken, and implicit, coercion when a boss makes a request for a significant loan of an employee under his supervision. Claimant's misuse of his position as a supervisor violated the standards of behavior his employer had a right to expect. Claimant's importuning of subordinates for a loan constituted willful misconduct*." Jeffrey R. Weingard v. Unemployment Compensation Board of Review, No. 2726 C.D. 2010, Filed August 10, 2011.

**POSSIBLE REDUCTION IN PENSION? NOT A NECESSITOUS AND COMPELLING REASON TO QUIT**

Shawn Oliver believed that the contract negotiations between his employer and his union would result in a $300-per month reduction in his pension benefits if he did not retire before November 1, 2009, and that this fact alone provided him with a necessitous and compelling reason to retire on October 30, 2009. He then applied for unemployment compensation benefits. In affirming the denial of his claim, the Commonwealth Court noted: "the law is that mere speculation about one's future job circumstances, and attendant benefits, without more, does not render a decision to voluntarily terminate employment necessitous and compelling." Shawn E. Oliver v. Unemployment Compensation Board of Review, No. 1655 C.D. 2010, Filed August 17, 2011. (*This same result was reached by the Commonwealth Court in the companion case of The Philadelphia Housing Authority v. Unemployment Compensation Board of Review, 892 C.D. 2010, Filed August 31, 2011.*)

**READY, WILLING & ABLE TO WORK?**

Section 401(d)(1) of the Law provides: "[c]ompensation shall be payable to any employee who is or becomes unemployed and who…[i]s able to work and available for suitable work." The burden of proving availability for suitable work is on the claimant. An unemployed worker who registers for unemployment is presumed to be able and available for work; however, this presumption is rebuttable by evidence that a claimant's physical condition limits the type of work he is available to accept or that he has voluntarily placed other restrictions on the type of job he is willing to accept. If the presumption of unavailability is rebutted, the burden shifts to the claimant to produce evidence that he is able to do some type of work and there is a reasonable opportunity for securing such work. The real question is whether the claimant has imposed conditions on his employment which so limit his availability as to effectively remove him from the labor marker. In the case of Thomas Rohde v. Unemployment Compensation Board of Review, No. 2629 C.D. 2010, Filed August 31, 2011, the claimant limited the hours he was available to work inasmuch as he needed to attend cardiac rehabilitation on a daily basis. He was willing to report to work after 10 AM, or to leave early at 2 PM. The Court held that, while placing these limitations on his availability to work was sufficient to rebut the presumption, claimant also produced evidence that he was able to so some type of work inasmuch as he continued to work in a part-time position. The Court noted that: "*The law does not require that the employee be available for full-time work, for permanent work, for his most recent work, or for his customary job, so long as the claimant is ready, willing and able to accept some suitable work."* Benefits were awarded.

**INDEPENDENT CONTRACTOR V. EMPLOYEE, *AGAIN!!***

In the case of SkyHawke Technologies, L.L.C. v. Unemployment Compensation Board of Review, No. 1691 C.D. 2010, Filed August 31, 2011, the Commonwealth Court reiterated the factors enunciated in Tracey v. Unemployment Compensation Board of Review (page 2, *supra*) to be reviewed when determining whether the requisite control exists to establish an employer-employee relationship, adding that a non-compete clause does not necessarily place the parties in an employer-employee relationship as a matter of law. The Court further examined what evidence is to be reviewed when determining whether "as to such services such individual is customarily engaged in an independently established trade, occupation, profession or business." 43 P.S. §753(*l*)(2)(B). The Court looked to the written agreement between the parties and noted that, although the relevant provisions limited claimant's ability to work for other entities, those limitations were related to a particular area of services, i.e., GPS mapping of golf courses. Claimant was still able to perform GPS mapping services for the public or other companies, so long as that work did not relate to golf course mapping. Additionally, the agreement clearly recognized that claimant could per-

form work elsewhere in the golf industry, but provided SkyHawke the ability to review that work to determine whether it conflicted with the services claimant provided to SkyHawke. The Court found these facts support the conclusion that the nature of claimant's business does not require him to look only to one employer to provide his services. Consequently, it was determined that claimant was an independent contractor and ineligible for benefits.

**CLAIMANT IS ENTITLED TO DUE PROCESS**

The Unemployment Compensation Board of Review found Rita Spence, a former Verizon employee, to be ineligible for benefits, stating: *The Board specifically finds the claimant incredible that the father of her two young children could not watch the children while the claimant worked.* The UCBR's finding was in direct conflict with the evidence of record and was wholly inapplicable to the case. Because the erroneous finding called into question whether the UCBR was actually reviewing the record relative to the claimant, the Court vacated the UCBR's decision and remanded the case to ensure that the claimant was afforded due process. The Court's full opinion may be found at Rita Spence v. Unemployment Compensation Board of Review, No. 412 C.D. 2011, Filed September 23, 2011.

**MERE *POSSIBILITY* OF LAY OFF IS NOT A NECESSITOUS AND COMPELLING REASON TO QUIT**

Mathew Munski was hired as a service technician by Verizon Communications in 2005. He continued working through July 3, 2010, when he accepted Verizon's Enhanced Income Security Plan (EISP) because he believed his position was being eliminated. He subsequently applied for unemployment compensation benefits. The application was denied and claimant appealed. Before the Referee, claimant's supervisor testified that he did not tell claimant he would be laid off if he did not take the offered EISP, although the area manager did tell the local union representative that "it was probably in the best interest of any Technician hired after to 2003 to take the EISP." Verizon offered evidence establishing that no service technicians had been laid off as of the date of the hearing and, if claimant had not accepted the EISP, he would have continued to work. The Referee and the Unemployment Compensation Board of Review found that claimant did not have a necessitous and compelling reason to resign. The Commonwealth Court affirmed, noting claimant merely received notice that Verizon "may" proceed to a layoff if the EISP offer did not sufficiently reduce the workforce. The notice did not target any particular occupational title and stressed that the positions affected by the anticipated layoff would not be known until after the results of the EISP were evaluated. Such a notice was insufficient to constitute a necessitous and compelling reason for claimant to accept the EISP and thereby end his employment. For a complete copy of the Court's opinion, please see Matthew Munski v. Unemployment Compensation Board of Review, NO. 193 C.D. 2011, Filed September 27, 2011.

**CHANGE TO RETIREMENT HEALTH CARE PLAN *MAY* CONSTITUTE A NECESSITOUS AND COMPELLING REASON TO QUIT**

Paul Detruf, a member of the United Steel Workers of America, was employed by Elliott Company for 40 years when he voluntarily retired due to changes in retiree health coverage. Specifically, in 2008, the union employees ratified a new contract which included negotiated changes to the employees' medical coverage. The 2008 plan included larger co-pays and deductibles. Employees who retired before February 2, 2010, were placed in the pre-2008 plan from their retirement date until they reached age 65 at which time they could go on Medicare. Because Detruf and his wife had significant medical expenses, he retired on June 29, 2010 so as to take advantage of the pre-2008 health care plan and lower co-pays. The UC Service Center denied Detruf benefits, and the UC Referee affirmed. The UCBR reversed, however, finding that the change in the employer's retirement health care plan constituted a necessitous and compelling reason for the claimant to quit his employment. The Commonwealth Court did not disagree that such a change could present a necessitous and compelling reason to quit, but reversed the UCBR's decision inasmuch as Detruf failed to meet his burden of proof. He failed to present specific evidence that retiring under the 2008 plan rather than the pre-2008 plan would result in a substantial decrease in his compensation. Had he presented evidence as to his income and expenses, the Court would have reached a contrary result. See Elliott Company, Inc. v. Unemployment Compensation Board of Review, No. 1783 C.D. 2010, Filed October 13, 2011.

**"NECESSITOUS AND COMPELLING REASONS " REVISITED**

In the case of James Earnest v. Unemployment Compensation Board of Review, No. 1823 C.D. 2010, Filed November 3, 2011, the Commonwealth Court noted that lack of work, perpetual layoffs and drastic reductions in hours constitute necessitous and compelling reasons to quit one's job; however, leaving employment in order to further one's education does not. The Law was not intended to subsidize college students who are working their way through school. Here, Mr. Earnest worked 2 jobs. He suffered a work injury and was disabled from his position with Muncy Homes. While collecting workers' compensation benefits, he enrolled in college. After he recovered, he attempted to return to work at Muncy, but was told that the company was "closed down" that week, that no work was available and it was unclear when normal operations would be resumed. He then quit, expecting to be continuing working at his other job. Soon thereafter he was laid off. The Court found that he resigned from Muncy for a necessitous and compelling reason and, therefore, he was eligible for benefits.

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ATTENTION READERS, the editors of Thomson, Rhodes & Cowie Pennsylvania Unemployment Compensation Newsletter invite you to submit questions you may have dealing with unemployment compensation issues. The editors will compile questions received and periodically provide answers to recurrent issues. Submission of a question is no guarantee that an answer will be provided, but we will make every effort to answer as many questions as possible. Of course, for specific legal advice the reader should seek counsel from a qualified unemployment compensation attorney.

Send questions to: Margaret M. Hock, Esquire, Thomson, Rhodes & Cowie, P.C., 1010 Two Chatham Center, Pittsburgh, PA 15219.