

Employee or Independent Contractor? UIA Adopts 20-Factor Test



Gerald C. Davis

Hiring workers can involve liability for homeowners and businesses alike, even if the workers hired are only part-time or temporary. An employer should be careful when deciding to classify a worker as an employee versus an independent contractor. The Internal Revenue Service (IRS) imposes severe penalties upon businesses and homeowners if a worker is misclassified as an independent contractor, rather than an employee.

Effective January 1, 2013, Michigan's Unemployment Insurance Agency (UIA) adopted the IRS' 20-factor test used to determine whether a worker is an employee or an independent contractor. Although this test is complex, requiring analysis on a case-by-case basis, generally, the 20-factors largely center on the extent of "control" the employer has over the worker. Factors determining an employer's control over a worker include who sets the worker's hours, specifies the number of helpers aiding the worker, determines the method and manner in which the work is completed, and furnishes the worker with equipment and/or a place of work.

A worker who is required to comply with instructions about when, where and how he or she is to work is ordinarily classified as an employee. As an employee, the employer is required to withhold federal income tax, FICA and other social security-type taxes from that worker's wages. Furthermore, an employee is issued a W-2 tax reporting statement at the end of the year, versus the Form 1099 received by an independent contractor.

In contrast, if a worker is responsible to the employer on a results-only basis, then the worker is more likely to be considered an independent contractor. For example, if the worker produces a finished product without supervision, guidance or direction from the employer or if the work done is of the type generally performed by an independent contractor, he or she is more likely to pass the 20-factor test. An employer is not required to withhold certain taxes from an independent contractor's wages and issues a 1099 instead of a W-2 at the year's end.

Careful application of the 20-factor test will guide an employer in the classification of a worker and help to avoid many problems with both the IRS and Department of Labor. The IRS will charge an employer additional taxes, penalties and interest if an employee is found to be incorrectly classified. Additionally, through the Department of Labor, a worker could recover back pay and liquidated damages under the Fair Labor Standards Act, as well as attorney fees. Further, failure to provide workers' disability insurance (generally referred to as workers' compensation insurance) could result in potential litigation to the employer if the individual is injured and determined to be an employee, when the employer failed to obtain workers' compensation coverage.

Gerald C. Davis

Gerald C. Davis is a partner in our Livonia office where he concentrates his practice on corporate and business law, leveraged buy-outs, company reorganization and refinancing, analyzing investments for joint ventures, intellectual property, and drafting loan agreements. He can be reached at (734) 261-2400 or gdavis@cmda-law.com.

Attorney Joins Livonia Office



Elizabeth Rae-O'Donnell

We are pleased to announce that Elizabeth Rae-O'Donnell has joined our Firm as an attorney in our Livonia office.

She focuses her practice on municipal law and labor and employment law. Prior to joining CMDA, Ms. Rae-O'Donnell served as the Assistant City Attorney for the City of Southfield where she practiced all areas of municipal law, including prosecutions, tax appeals, zoning and planning, Freedom of Information Act and labor and employment matters.

Ms. Rae-O'Donnell received a Juris Doctor degree from the University of Detroit Mercy Law School and a Bachelor of Arts degree from the University of Michigan.

Beth, as she is called by friends and family, followed in her father's footsteps when she chose law as her profession. Not only does she love the law, but she firmly believes that the art of advocacy is the discovery of truth. Ms. Rae-O'Donnell and her husband Bob live in Farmington Hills and are the proud parents of five daughters and one son.

She can be reached at (734) 261-2400 or brae@cmda-law.com.

Attorneys Obtain Positive Results for Clients

Attorneys at our Firm have a successful record of obtaining the best results possible for our clients. In this article, some recent cases handled by our attorneys are highlighted. While every case is different, the summaries provide insight into how we achieve success for our clients. To protect the confidentiality of our clients, we have not included names.

[Attorney Defeats Environmental Nuisance Claim](#)

Timothy Young, Partner in our Livonia office, successfully defeated an environmental nuisance claim presented on behalf of 13 homeowners. The homeowners alleged that daily noise and diesel fumes from the property of Mr. Young's client interfered with the peaceful and quiet enjoyment of their property.

The depositions of each of the plaintiffs and their noise expert revealed that the plaintiffs did not sustain personal property damage, real property damage or diminution in the value of their property as they alleged. In addition, the depositions revealed the plaintiffs did not suffer the significant harm required by the law governing nuisance.

Mr. Young's client obtained a summary disposition order dismissing the case before trial. The keys to the victory were the extensive depositions to refute the plaintiffs' claims, in addition to the outstanding contributions by the real estate expert and the acoustical engineers, which Mr. Young retained on behalf of his client.

[Breach of Contract Case Settles for Substantial Amount](#)

In another case, Mr. Young presented a claim for a breach of

contract against a group of out-of-state insurers. The insurers filed a motion to dismiss the case asserting the statute of limitations barred the claim. Through the legal briefs filed and mediation of the claim, Mr. Young successfully asserted the claim was not barred due to esoteric statutes pertaining to the defendants as surplus lines insurers. As a result, the case settled for a substantial amount in favor of Mr. Young's client at the mediation hearing.

[Attorneys Obtain Dismissal for Corporate Client](#)

T. Joseph Seward, Managing Partner, recently obtained a dismissal in favor of a large corporate client on a vicarious liability and premises liability claim. The plaintiff alleged that our client was liable for actions taken by law enforcement officers during an event hosted by the client.

Recognizing the large size of the event, our client took the opportunity to inform law enforcement that their presence would be welcomed if they wished to provide personnel. The plaintiff alleged that she had been injured when a law enforcement officer escorted her out of the venue during the event. After getting the plaintiff to admit the sole cause of her alleged injury was the conduct of the officer, Mr. Seward successfully argued that a private entity cannot be liable for actions that law enforcement officials take in the performance of their official duties. Kali Lester, Associate Attorney in our Livonia office, assisted Mr. Seward with the case.

[Attorneys Obtain Summary Judgment in Defective Sidewalk Case](#)

Mr. Seward and Julianne Polgar, Associate Attorney in our Livonia office, recently obtained dismissal in favor of a municipi-

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Attorneys Obtain Positive Results (cont.)

pality for governmental immunity. This case arose out of the trip and fall while the plaintiff was jogging on a sidewalk. The plaintiff attempted to sue the municipality by claiming there was a defect in the sidewalk of greater than two inches.

In the motion for summary disposition, Ms. Polgar argued that the discontinuity was 1.5 inches and, therefore, the plaintiff could not rebut the inference that the municipality maintained the sidewalk in reasonable repair. The plaintiff attempted to argue the discontinuity was greater than two inches by relying on three things: 1. photographs taken by the plaintiff, 2. photographs taken by plaintiff's attorney, and 3. an expert affidavit. The plaintiff's photographs show a ruler jammed into the ground. The proper measurement on the plaintiff's photographs showed a discontinuity of less than two inches. The photographs taken by the plaintiff's counsel were claimed as work-product during discovery and could not be authenticated by the plaintiff. Additionally, the court found that the affidavit of the plaintiff's expert did not create a question of fact for whether the inference was overcome. Therefore, the court granted the municipality's motion for summary disposition.

[Attorneys Obtain Summary Judgment in Excessive Force Case](#)

Mr. Seward and Ms. Polgar recently obtained summary judgment in favor of a municipality in an excessive force case. This case involved a plaintiff who was arrested for breaking and entering. The plaintiff alleged that during his arrest he was kicked and punched by the arresting officer and brought suit against the municipality and eight individual officers. Prior to filing the motion for summary judgment, the plaintiff agreed to voluntarily dismiss six of the officers, leaving two named officers and the municipality in the suit. In arguing summary judgment in favor of the municipality, Ms. Polgar argued that the plaintiff did not have any evidence to support either an unconstitutional policy or a failure to train cause of action. Regarding the two remaining officers, the plaintiff testified that the arresting officer kicked and punched him and the other officer stood by and watched. Ms. Polgar argued that the officer who was present, but did not allegedly kick or punch the plaintiff, did not have the opportunity to intervene and therefore, was entitled to summary judgment in his favor.

Regarding the officer that allegedly used excessive force, Ms. Polgar argued that the record so heavily contradicted the plaintiff's testimony that no reasonable jury could find in favor of the plaintiff.

The court found in the defendants' favor and granted the motion for summary judgment.

[Attorney Successfully Defends Two Defective Sidewalk Claims](#)

Lindsey Kaczmarek, Associate Attorney in our Livonia office,

successfully defended two defective sidewalk claims for municipal clients. In the first case, the plaintiff claimed he was seriously injured while riding his bicycle along a public sidewalk. The plaintiff alleged that he struck an unmarked guy wire strung across the sidewalk from a utility pole.

The plaintiff served the municipality with pre-suit notice, identifying the intersection at which the alleged incident occurred and the location of his alleged injury. Ms. Kaczmarek filed a motion for summary disposition early in the litigation, hoping to prevent the municipality from incurring unnecessary discovery-related expenses. Ms. Kaczmarek argued that the guy wire was not an actionable "defect" under the highway exception, as it was not an imperfection in the walkway itself. She further argued that because the utility pole from which the guy wire extended was expressly excluded from the statutory definition of "highway," the guy wire should – by a parity of reasoning – likewise be excluded. Ms. Kaczmarek also sought summary disposition on the ground of deficient notice. She argued that, although the plaintiff identified the intersection at which the incident allegedly occurred, he failed to specify whether the incident occurred on the sidewalk or the street. She also argued that identifying the location of an injury is not one and the same as identifying the nature of an injury. She pointed out that an injury to the neck, for example, could be as simple as a muscle pain or as catastrophic as a spinal cord injury. The Court agreed with Ms. Kaczmarek's arguments, granted the motion for summary disposition and dismissed the plaintiff's lawsuit.

In the second case, the plaintiff claimed that she tripped and fell on a public sidewalk due to a discontinuity between adjoining sidewalk slabs. The plaintiff served the municipality with pre-suit notice shortly after the alleged incident. The plaintiff's deposition revealed that the plaintiff misidentified the location of the alleged defect in her notice. The deposition also revealed that the plaintiff knew the identity of an eyewitness and the nature of her alleged injuries – neither of which was specified in the notice – before the statutory notice period expired.

Ms. Kaczmarek filed a motion for summary disposition on behalf of the municipality. Ms. Kaczmarek argued that the municipality was entitled to immunity based on the deficiencies in the plaintiff's notice. She further argued that the plaintiff's supplemental notices, all of which were served after the statutory period expired, could not be considered in determining whether the plaintiff satisfied the notice requirements. Agreeing with Ms. Kaczmarek, the Court granted the motion for summary disposition and dismissed the plaintiff's lawsuit.



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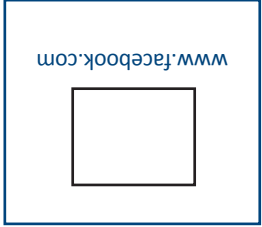
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To meld our legal expertise, professional support staff, technical resources and variety of locations to deliver first rate legal services at a fair value to a full range of business, municipal, insurance and individual clients.



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