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UPDATE

WINTER 2006 / 2007

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**ROTH IRA  
CONVERSIONS**

A traditional individual retirement account (IRA) is funded with before-tax contributions and grows tax-deferred, but not tax-free. (Taxpayers with a 401(k) plan provided by their employers, and who fall into higher income tax brackets, generally cannot deduct an IRA contribution.) Beginning at age 70-1/2, the individual must take minimum distributions from a traditional IRA, which are taxed in full at the income rate then applicable to the taxpayer.

By contrast, contributions are made to a Roth IRA with after-tax money. If the account has been held for at least five years, the accumulated principal and interest in a Roth IRA may be withdrawn tax-free once the individual reaches 59-1/2. Unlike a traditional IRA, there are no mandatory minimum distributions for a Roth IRA.

The ability to make contributions to a Roth IRA is phased out for couples with a modified adjusted gross income of between \$150,000 and \$160,000 (\$95,000 to \$110,000 for individuals). While those contribution restrictions will remain in place, a new law that goes into effect in 2010 will open

up the Roth IRA to higher-income taxpayers by allowing them to convert a traditional IRA account into a Roth IRA account, thereby benefiting from the Roth features when money is withdrawn. A current provision limiting Roth conversions to those taxpayers with adjusted gross incomes of under \$100,000 will no longer be in effect.

When a conversion occurs, the individual withdraws funds from the traditional IRA account, reports those funds as income, and transfers them to a Roth IRA. The conversion must be done before December 31 of the current tax year. If the earlier IRA contributions were taken as deductions, taxes will be due on both the principal and the earnings. Otherwise, taxes will be due only on the earnings. In any event, funds can be converted from a traditional IRA to a Roth IRA without incurring the 10% penalty for early withdrawals.

Why worry now about a law that will not go into effect until 2010? Because proper planning and saving in a traditional IRA between now and then can result in a significant nest egg that can be converted into a Roth IRA when the income restrictions are lifted in 2010. For example, given current and projected limits on contributions to

a traditional IRA, a married couple in their fifties, with at least one spouse working, could contribute over \$50,000 to a traditional IRA over the next few years, then convert those funds to a Roth IRA, and thereafter reap the benefits of that type of retirement fund. Since some taxes will be due whenever the conversion takes place, it also is advisable to save up some funds outside of the account for that day of reckoning with the IRS.

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## COMPUTER FRAUD AND ABUSE ACT

Since 1994, the federal Computer Fraud and Abuse Act (“CFAA”) has provided civil remedies to complement the original criminal sanctions for the theft and destruction of computer data, fraudulent use of passwords, and various means of committing fraud by unauthorized access to computers. For a typical claim under the CFAA brought against a defendant who violates the statute in an attempt to gain a competitive advantage over the plaintiff, there must be a financial loss of at least \$5,000 in order to maintain a civil cause of action.

The ability to obtain injunctive relief under the CFAA is at least as valuable to an injured party as the recovery of damages. To win an injunction, however, the plaintiff must be in a position to prove not just the unauthorized intrusion into the plaintiff’s computers, but also specifics as to what information was taken by the defendant and how it was used to harm the plaintiff.

In a recent case, a former officer and an employee of a party supply store were alleged to have gathered information from their former employer’s computer without authorization, so as to get a leg up on the plaintiff in their new, competing business. The elements for the claim were in place, except for the critical proof as to what data records of the plaintiff’s were accessed and whether such records had been downloaded, copied, or printed by the defendants. The plaintiff business was denied an injunction in federal court because of this gap in its proof.

The case of the competing

party-supply businesses offers objective lessons for how businesses can best put themselves in a position to take full advantage of the Act if they have been victimized. One advisable technical step is to include an auditing function in a computer system that automatically records what documents have been accessed and what happens to the documents when they are accessed. The resulting “audit trail” can be a valuable piece of evidence in an action under the CFAA. When employees are allowed to work at home on their computers, employers should have policies allowing them to inspect those computers when the employment ends and to retrieve any of their data.

Although technical measures and policies on computer technology are important, simple use of imagination can also produce relevant noncomputer evidence for a CFAA claim. The court in the unsuccessful action by the party-supply store observed that the plaintiff could have presented evidence that the defendants had taken particular actions to the competitive disadvantage of the plaintiff very soon after their unauthorized access to the plaintiff’s computers. This would have allowed an inference that secrets had been taken from, and then used against, the plaintiff.



## EMPLOYEE OR INDEPENDENT CONTRACTOR?

The legal distinction between an employee and an independent contractor may seem like a subject suitable only for a law school exam, but it has real-life significance for both employers and employees.

Considering just federal taxes, for example, if a worker is an employee, the employer must withhold income tax and the employee’s part of Social Security and Medicare taxes. The employer also is responsible for paying Social Security, Medicare, and unemployment taxes on wages. An employee can deduct unreimbursed business expenses if the employee itemizes deductions and the expenses are more than 2% of the adjusted gross income.

If the worker has independent contractor status, however, there is no withholding, and the contractor is responsible for paying the income tax and self-employment tax. In that situation, it also may be necessary to make estimated tax payments during the year. An independent contractor can deduct business expenses, but on a different schedule of the tax return than is used by an employee.

So how do you tell the difference between an employee and an independent contractor? There is no single, quick answer. The particular facts of each case must be examined. However, relevant facts can be grouped into three general categories: behavioral control; financial control; and relationship of the parties.

**Behavioral Control:** The focus

here is on who has the right to control how a worker does the work, rather than simply on the end result of the work. If a business has that right, the worker is an employee; if the worker retains that right, he is an independent contractor. The more that a worker gets instructions or training on how the work is to be done—such as determining what equipment to use, hiring assistants, or deciding where to get supplies—the more likely it is that the worker is an employee.

**Financial Control:** Apart from the actual performance of work, there is the question of a right to control the dollars-and-cents part of the work. Rather than having a direct financial stake in the business, an employee essentially works for a paycheck and maybe some reimbursed expenses. Some factors pointing more toward an independent contractor status include a worker's significant investment in the work, his or her lack of a right to reimbursement of even high business expenses, and his or her potential to realize a profit or suffer a loss.

**Relationship of the Parties:** This factor considers how the parties themselves perceive their relationship. While an independent contractor, as the term suggests, is on his own concerning benefits, a worker who is provided insurance, retirement benefits, or paid leave is probably an employee. Sometimes the clearest picture of a worker's status is to be found in a written contract. The parties' intent, as shown in a contract, can be decisive, especially if the other factors do not lead to a conclusive answer.

## THE HAZARDS OF RESUME SCREENING

It is popular now for employers to use screening tests, often administered on the Internet, to weed out a large portion of applicants for job openings before making the more difficult selections from among those who survive that first cut. Such tests are supposed to measure cognitive ability, personality characteristics, or, in fewer instances, the ability to perform in a simulation of the duties that the job requires. The easily administered and scored screening tests have their appeal, especially if you are charged with filling, say, 10 positions from 100 people who have submitted resumes.

A downside to screening tests is the risk that rejected applicants may persuade a court that the tests essentially were a tool to accomplish prohibited discrimination, even though that may not have been the employer's intent. For example, an employment test that impacts racial minorities or women disproportionately could lead to liability unless the employer can show that the test is sufficiently related to the job and is necessary to the employer's business.

Another potential pitfall stems from the prohibition in the Americans with Disabilities Act (ADA) against medical testing of job applicants. There sometimes is a fine distinction between acceptable personality or psychological tests and prohibited medical tests. The screening of applicants also could run afoul of some state statutes that protect against invasions of privacy.

When individuals adversely affected by a personality test challenged the test in federal

litigation under the ADA, an appellate court struck down the test. The test, at least in some of its 502 questions, was a prohibited examination of the applicants' mental health. Its true or false questions went much farther than the acceptable lines of inquiry about matters such as working well in groups or in a fast paced office. Instead, they ventured into the realm of psychiatric disorders. In this case, a prospective manager of a rent to own store could not be required to give true or false answers to statements such as: "I see things or animals or people around me that others do not see"; "At times I have fits of laughing and crying that I cannot control"; or "My soul sometimes leaves my body."

## THE IRS AND PRIVATE DEBT-COLLECTION

The IRS recently began a pilot - project that uses private debt-collection agencies to collect back taxes. The controversial program will employ three private collection agencies to target 40,000 delinquent accounts of taxpayers who are in the red to Uncle Sam for \$25,000 or less. The agencies get to keep up to 25% of what they collect.

Criticism of the program includes the fear that tax delinquents will be harassed illegally, even though the agencies will be subject to fair debt collection laws. There is also concern about turning over sensitive personal and financial information to private companies.

If you are one of the 40,000 accounts targeted, the IRS must inform you in writing. However, you will be allowed to opt out at that time and deal directly with the IRS.

**COMMERCIAL LANDLORD  
SUED FOR UNSAFE  
CONDITIONS**

A silkscreen printing company with one employee rented a building from a commercial landlord. The employee suffered permanent injuries after falling from the stairs leading to the basement of the building. In the ensuing lawsuit against the landlord, the employee alleged that the fall happened because the stairs were wobbly, had no handrail, and had low ceiling clearance. The court found that the landlord had no liability.

Bearing in mind that there was no direct contractual relationship between the employee and the landlord, there could be a duty of care running from the landlord to a third party (such as the employee) only in one of two circumstances: if the landlord bound itself by contract (i.e., in the lease) to make repairs and then did so negligently, or if the dangerous defect was in an area over which the landlord retained control, such as a common area. The case before the court presented neither of those circumstances.

The fall occurred in an area clearly leased and controlled by the tenant. In unambiguous language, the lease provided that the tenant would have exclusive control of the premises and that the tenant had the obligation to maintain the building at its own expense. It was necessary under the terms of the lease for the landlord to approve of repairs made by the tenant, and the landlord reserved the

right to come onto the premises to make repairs that were “compatible with the lessee’s use of the premises.” Nonetheless, the result of the negotiations between the landlord and tenant, which were small entities with equal bargaining power, was that the responsibility for maintaining the building in a safe condition fell to the tenant, not the landlord. The employee’s remedies for his injuries were effectively limited to workers’ compensation benefits, for which he was qualified and which he had begun to receive.

It made all the difference to the outcome that the lease was commercial, rather than residential. A commercial lease is essentially a business transaction, a contract for possession of property, and the “ancient” common-law rule is still observed, in keeping with the maxim “let the buyer (tenant) beware.” In such a case, the terms of the



agreement are most important. By contrast, with regard to residential leases, the law has evolved more favorably for tenants, for various public policy reasons, including disparity in bargaining power between the parties. A duty of care for residential landlords need not be found in the fine print of a lease. Rather, a residential landlord is bound to act as a reasonable person would under all of the surrounding circumstances, including the likelihood of injuries, the probable seriousness of such injuries, and the burden of reducing or avoiding that risk. In short, the employee would have fared better in court if the stairs from which he fell had been in a rented apartment.

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