

NONPROFIT MATTERS

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Message from PLC's Executive Director

What drives you? What's your passion? What makes you do your job day after day? If you're like most nonprofit leaders, the answer is right in your organization's mission statement. It's the critical program work that keeps most leaders engaged and enthused. But, along with the "fun" stuff, there are a multitude of tasks related to things like personnel, compliance and good governance that are just as important as the services our organizations provide. The Public Law Center has lawyers who can help. Whether it's a wage claim, a contract negotiation or bylaws revision, we can help, and at no cost to your organization. Contact Diamond Tran if you need assistance.

- Ken Babcock

Nothing in this newsletter should be construed as legal advice. For more information about complying with the various laws mentioned in this newsletter, please consult a legal or tax professional.

Employee or Independent Contractor? Know the Difference

By Carol Samaan, Latham & Watkins LLP

It is essential for organizations (*i.e.*, employers) to correctly classify workers as either employees or independent contractors for a variety of reasons, including issues relating to federal and state taxes, workers' compensation, employment discrimination and vicarious liability. This article briefly addresses the classification of a worker for federal income and employment tax law purposes and the consequences of misclassification of a worker's status, which may result in payments,

interest and penalties for the employer.

How to Determine Whether a Worker Should Be Classified as an Employee or Independent Contractor

There are several tests and factors to consider in determining whether a worker is an employee or independent contractor for federal income and employment tax law purposes. Some of these tests are outlined below.

1. Common Law Test

The federal tax regulations provide a basic "control" test, which examines the employer's

right to control and direct the worker, not only as to the result to be accomplished, but also as to *how* the worker accomplishes the result. Courts have elaborated on the common law test by looking at factors under agency law, including:

- ◆ The duration of the relationship between the parties;
- ◆ Whether the employer has the right to assign additional projects to the worker;
- ◆ Whether the worker has discretion over when and how long to work;
- ◆ How the worker is paid;

Continued on page 4

Universal Paid Sick Leave Law

By Kathryn Dao*

Under legislation that recently passed in the state assembly, California would become the first state to require paid sick leave for every worker. Many employers voluntarily offer paid sick leave, but no states have passed legislation mandating it.



If signed into law, [AB 2716, the Healthy Families, Healthy Workplaces Act](#), would require employers with more than ten (10) employees to provide up to nine (9) paid sick days per year. Those with ten (10) or less employees would have to provide up to five (5) days. Essentially, full and part-time workers would earn one hour of sick leave for every 30 hours worked.

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Document Retention Policies—What Every Nonprofit Should Know

Recently, the Internal Revenue Service (the “IRS”) released a significantly revised [Form 990](#), the annual information return filed by most publicly supported exempt organizations. Through the release of the revised Form 990, the IRS indicated its intent to continue its scrutiny of the corporate governance policies of exempt organizations. Specifically, Part VI of the revised Form 990 includes several questions regarding corporate governance, including questions about board structure and organizational policies. In particular, in Question 14, the IRS now asks exempt organizations whether they have a written document retention policy in place. Although not required by tax law, the IRS increasingly views such policies and good governance practices as a means to establishing transparency and ensuring compliance. Furthermore, exempt organizations should be aware of certain requirements of the Sarbanes-Oxley Act of 2002 (the “Act”) that apply to nonprofits: specifically, the imposition of

criminal liability on exempt organizations that destroy records with the intent to obstruct a federal investigation. While the Act does not explicitly require the adoption of a document retention policy, it is recommended that exempt organizations adopt and abide by a document retention policy as a “best practice.”

Document Retention Policies

A document retention policy sets guidelines for the length of time that various documents – ranging from contracts to employment agreements to vendor receipts – will be held in the files of the organization. The adoption of a document retention policy serves to notify employees, officers, and directors of the time periods for which documents should be maintained, and helps to guard against improper disposal or destruction of documents with the intent of obstructing an investigation. A document retention policy should contain a list of document categories, along with the

length of time (months or years) the organization should retain such documents. In addition, these policies should contain a provision that restricts employees, officers, and directors of the organization from destroying documents in anticipation of litigation. Prior to establishing document retention time periods, organizations should consult with its legal counsel regarding local laws, as they vary by jurisdiction, paying particular attention to both statutes of limitations and statutory and regulatory requirements to maintain originals or copies.

This has been excerpted from an article published in May 2008 by the D.C. Bar Pro Bono Program and Winston & Strawn LLP. For the full article, please visit: www.LawHelp.org.

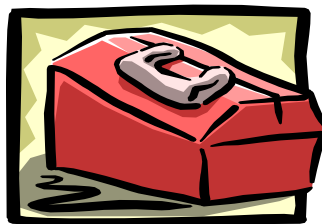
Through pro bono counsel, the [Public Law Center](#) may be able to provide eligible organizations with legal assistance in drafting document retention policies.

Updates from the IRS

In May, the IRS released [Notice 2008-49](#), which is new guidance on public disclosure of [Form 990-T, Exempt Organization Business Income Tax Return](#). It provides that the IRS and the filing organization are required to make Form 990-T publicly available for the three years beginning on the last day (including extensions) for filing the return. This includes any attachments, schedules, and supporting documents that *relate to imposition of the unrelated business income tax*. Guidelines in [Treas. Reg. § 301.6104\(d\)-1](#) and [Notice 2007-45](#) continue to apply, except that a return covered by the guidelines must now include an exact copy of a Form 990-T filed by an organization after Aug. 17, 2006. The IRS is inviting comments, especially with respect to schedules or

attachments that should not be made available for public inspection when attached to Form 990-T. For more information, visit the [IRS website](#).

[Announcement 2008-21](#) explains the procedures the public may use to request to inspect or copy an organization’s Form 990-T.



The new “[Exempt Employer’s Toolkit](#)” centralizes commonly needed federal tax resources for tax-exempt organizations that compensate employees.

Applications for the [Volunteer Income Tax Assistance \(VITA\) matching grant program](#) are due Sept. 2, 2008. VITA offers free tax help for low-to-moderate income individuals. Information and the application are at www.grants.gov.

Final regulations were issued describing the factors used to determine whether to revoke an organization’s tax-exempt status if it engages in an excess benefit transaction. The [examples](#) illustrate that prohibited private benefit may involve non-economic benefits as well as economic benefits, and that prohibited private benefit may arise regardless of whether payments made to private interests are reasonable or excessive.

New Laws Affecting Your Clients

Consumer Law

A preliminary settlement agreement in the class action suit [*In re Trans Union Corporation Privacy Litigation*](#) would allow millions of Americans to access their credit reports and scores, or receive credit monitoring, for free as compensation for selling consumers' private information in violation of federal privacy laws. Individuals that have had any form of open credit account - a charge card, student loan, auto loan or a mortgage - at any time between Jan. 1, 1987, and May 28, 2008 are eligible. The deadline to file a claim is Sept. 24, 2008. Visit the [settlement website](#) or call (866) 416-3470 to file a claim.



Criminal Law

[AB 2937](#) would mandate that criminal records relating to a wrongful conviction are sealed, and would adjust the amount of compensation for wrongful conviction to reflect federal standards. AB 2937 was released from Appropriations and now moves to the full Assembly.

Disability Law

In April, a federal court ruled against the Social Security Administration (SSA) in a [class action suit](#) brought by the American Council of the Blind concerning SSA's failure to accommodate blind and visually impaired beneficiaries and applicants. The SSA is now required to provide effective notice of its actions in a format that is accessible to all beneficiaries.



Domestic Violence

[SB 1356](#), effective Jan. 1, 2009, protects domestic violence survivors from the threat of incarceration when they refuse to testify against

their abuser in court.

Food Stamps

There were a number of significant food stamp changes passed in the [Farm Bill](#) that are effective Oct. 1, 2008. There will no longer be a cap on the dependent care deduction. For additional changes and details, visit [Food Assistance](#) at the Center on Budget and Policy Priorities. [The California Food Stamp Guide](#) contains the latest food stamp program developments.



Foster Children

[AB 3051](#) gives foster children 10 years and older the right to address the court and fully participate in dependency court hearings. Courts are required to continue the hearing if the child was not properly notified, unless the court finds that it is in the best interest of the child not to do so.

Gay Marriage

In a recent state Supreme Court ruling, California became the second state to recognize gay marriage. However, this ruling does not settle the gay marriage debate. [Proposition 8](#) is on the November ballot and if it succeeds, the state constitution would ban gay marriage.



Housing

In an effort to prevent more foreclosures in California, [SB 1137](#) now requires lenders to give homeowners more and earlier warnings that their home loans are heading toward default. It also gives renters more time to find housing when they are being evicted because their landlord is losing the



property. Local governments are permitted to force lenders to maintain property that is vacant after a foreclosure.

Immigrant Children

The Immigrant Children's Health Improvement Act (ICHIA), which is included in [HR 3014, the Health Equity and Accountability Act](#), would allow states to provide medical coverage to lawfully present immigrant children and pregnant women under Medicaid or the State Children's Health Insurance Program (SCHIP) without the current 5-year waiting period requirement.



Social Security Benefits

Social Security recipients without bank accounts may now receive their benefits on a debit card in lieu of a paper check. To sign up, visit [www.usdirectexpress.com](#) or call (877) 212-9991.

Tax Rebate

The [Economic Stimulus Act of 2008](#) was approved in February. To receive payment, taxpayers must have a valid social security number, a minimum of \$3,000 in income, and file a 2007 tax return by Oct. 15, 2008. Those who receive social security benefits and have no tax liability also qualify if they file a 1040A tax form for 2007. The IRS began mailing payments in May and is still trying to reach those who have not filed the tax returns needed to qualify for their stimulus checks. These individuals are primarily seniors and veterans who receive social security benefits and have no tax liability. It is not too late to file. The IRS is encouraging employers and charities to reach out to those who may be eligible but normally have no requirements to file a return. Please visit [the IRS website](#) for additional information.

“Independent Contractors” cont. from pg. 1

and

- ◆ Whether the worker can hire and pay assistants.

2. IRS Factors

The IRS set forth a list of 20 factors that employers should consider in determining a worker’s status for federal income and employment tax law purposes. The list is not exhaustive, and no single factor is determinative. Some of these factors include:

- ◆ Whether the employer provides instructions and/or training to the worker;
- ◆ Whether the worker’s services are integrated into the employer’s business;
- ◆ Whether the worker must render the services personally;
- ◆ Who retains the right to hire, supervise and pay assistants;
- ◆ Whether there is a continuous, long-standing and exclusive work relationship;
- ◆ Whether the worker must work full time and/or during set hours;
- ◆ Whether there is a regular schedule of payments to the worker, rather than a lump sum payment upon completion of the services;
- ◆ Whether the worker is entitled to payment of business and/or travel expenses;
- ◆ Whether the worker has made a significant investment to perform the services, and/or expects to realize a profit or loss from the work;
- ◆ Whether the employer furnishes tools and materials to the worker;
- ◆ Whether the employer retains the right to discharge the worker at any time without incurring liability;
- ◆ Whether the work must be performed on the employer’s premises; and
- ◆ Whether the worker must provide reports to the employer.

The IRS also published [Worker Classification Training Guidelines](#), which provide guidelines to assist IRS agents in determining whether a worker should be classified as an

employee or independent contractor for federal tax purposes, including:

Behavioral control: Does the employer have the right to control *how* the worker performs his or her services and *what* the worker does? If so, this factor would tend to suggest an employer-employee relationship.

Financial control: Does the employer have the right to control or direct the business aspects of the worker’s activities, such as how the worker is paid, or whether the worker is reimbursed for expenses? If so, this factor would tend to suggest an employer-employee relationship.

Relationship of the parties: How do the parties perceive their relationship? Are there written agreements that classify the worker’s status? Is the worker eligible to receive employee-type benefits, such as pension benefits, vacation, paid time off, or medical insurance coverage?

3. IRS Form SS-8

An employer or worker may also file [IRS Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding](#), to request the IRS to make an official determination of the worker’s classification.

Federal Income and Employment Tax Implications

The classification of the worker’s status as an employee or independent contractor will have important tax consequences for both the employer and the worker. In general, if the worker is classified as an employee, the employer would pay the employer’s portion of the Social Security, Medicare and federal unemployment taxes, and withhold federal income taxes and the employee’s portion of Social Security and Medicare taxes from the employee’s wages. The employer should report the employee’s wages

on [Form W-2](#).

A worker classified as an independent contractor generally would be responsible for paying his or her own federal income and self-employment taxes and may be required to remit estimated tax payments to the federal government throughout the year to cover such tax liabilities; the employer would not be required to withhold these amounts. The employer may be required to report payments to the independent contractor on [Form 1099-MISC \(Miscellaneous Income\)](#).

Consequences of Misclassification

If an employer misclassifies an employee as an independent contractor, the employer may be liable to pay the worker’s federal employment taxes, in addition to interest and certain penalties. However, if the employer can establish a reasonable basis for not properly classifying the worker, the employer may be able to obtain relief from such liability. An employer may be able to establish a reasonable basis for the misclassification by demonstrating that the employer evaluated all the facts and circumstances regarding the employment relationship and made a reasonable determination with respect to the worker’s status. Therefore, it is important for employers to document the reasons for their classification of workers, including the factors considered and evidence relied upon in making such determinations.

* * *

The classification of a worker as an employee or independent contractor is a complex issue and involves a careful consideration of a number of factors. For more information, please see [IRS Publication 15-A, Employer’s Supplemental Tax Guide](#), or consult your tax advisor.

The Public Law Center may be able to provide eligible organizations with pro bono legal assistance in drafting employment-related agreements.

New Laws Affecting Nonprofits

Background Checks for In Home Care Givers

SB 692 now authorizes a nonprofit consortium or public authority to assist an elder or disabled adult who does not qualify for **In-Home Supportive Services (IHSS)**, a caregiver program for low-income patients, to obtain a criminal background check on an unlicensed in-home provider. Existing law only requires IHSS providers to pass a criminal background check. The nonprofit consortium or public authority is also allowed to recover the costs of the background check, which are conducted by **the Department of Justice**.



Employment Law

A recent federal appeals court ruling limits an employer's ability to read an employee's email and text messages on employer-financed accounts. Employers that contract with an outside server for text messaging and email are banned

from accessing messages sent by an employee without the employee's consent. Employers who maintain an internal server to handle email accounts are unaffected by the ruling.



No Child Left Inside Act

In June, the House Education and Labor Committee passed **HR 3036, The No Child Left Inside Act (NCLD)**, which provides incentives for the development and enhancement of environmental education programs as part of teachers' regular curriculum. NCLI also provides competitive grants through **the Department of Education** to nonprofits, state education agencies, local education agencies or institutes of higher education to initiate, expand or improve environmental education programs. However, local and state park agencies, and state natural resources agencies were not included as eligible entities. This bill is in the first stage of the

legislative process and may undergo major changes in markup sessions.

State Budget

California is facing another budget crisis this year with the deficit worsening. The Governor's May Revise contains deep cuts in key areas such as K-12 education and health and human services. According to the **California Budget Project**, here's how this county will be affected:

- Significant cuts of \$595 per student to public schools
- 7,180 low-income children would be dropped from CalWORKS
- 69,080 low-income seniors and persons with disabilities would lose cost-of-living adjustments for SSI
- 13,560 low-income seniors and persons with disabilities would receive fewer hours of critical in-home services
- 18,450 children would lose Medi-Cal coverage
- 368,080 low-income Medi-Cal recipients may have reduced access to health care services

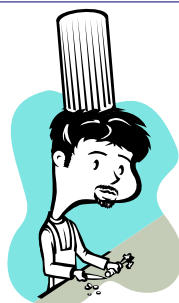


“ Sick Leave” cont. from pg. 1

Workers must be employed for 90 days before the benefit becomes available. The benefit could then be used for a personal illness, to care for an ailing family member, or to recuperate from sexual assault or domestic violence.

Under AB 2716, if an employer unlawfully withholds paid sick days to any employee, a fine of \$250 per incident may be imposed. Additionally, the bill prohibits employers from retaliating against employees who request and/or use paid sick leave. **The Department of Industrial Relations** would oversee enforcement. The measure could also be enforced through civil lawsuits.

Proponents estimate that AB 2716 would protect more than 5 million



Californians – about 1/3 of the work force – who are currently without paid sick leave. Proponents argue that employees are forced to choose between working while sick or losing pay. They see the bill as an important part of maintaining a healthy economy. Paid sick days increase employee morale, reduce turnover, and decrease health care costs.

Opponents of the bill argue that many small employers simply could not afford to comply with AB 2716's mandate. Employers would need to maintain records for five (5) years of hours worked and sick time accrued and used by employees. Opponents also argue that employers would

also face increased costs due to lost productivity and potential overtime costs when employees do not show up for work.

AB 2716 moves next to the Senate Appropriations Committee and is expected to be heard in July.

The Public Law Center may be able to provide eligible organizations with pro bono legal assistance in drafting sick leave policies.

Kathryn Dao is a second-year law student at Michigan State University and currently a summer law clerk for the Public Law Center.

For text and status updates of state law, visit the Official California Legislative Information website at:

<http://leginfo.ca.gov/bilinfo.html>.



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The Public Law Center, Orange County's pro bono law firm, is committed to providing access to justice for low-income residents. Through volunteers and staff, the Public Law Center provides free civil legal services, including counseling, individual representation, community education, and strategic litigation and advocacy to challenge societal injustices. Now in its 27th year, PLC is sponsored by the Orange County Bar Association and is supported by lawyers throughout the county.

PLC may be able to assist your clients who are low-income Orange County residents and have certain types of immigration, family law and civil legal problems, including: landlord-tenant, homeownership, collection, bankruptcies, consumer, estate-planning, discrimination, employment, adoptions, guardianships, custody matters, divorces involving children or domestic violence, and immigration work for survivors of crime or domestic violence. To determine whether your clients are eligible for services, they may contact the Legal Aid Society of Orange County, which regularly refers cases to PLC, or attend one of PLC's clinics at various homeless shelters and community organizations around Orange County. Information about our clinics can be received by calling our front desk at 714-541-1010 or by visiting our [website](http://www.publiclawcenter.org).

About COLAP

PLC's Community Organizations Legal Assistance Project (COLAP), through staff and pro bono volunteer attorneys, provides free transactional legal assistance to local non-profit organizations that face a variety of business law issues in areas such as contract law, employment law, fundraising law, corporate governance law, and real estate law. For instance, COLAP can match organizations with attorneys to review and draft bylaws, employment handbooks, service provider contracts, and commercial leases. COLAP also provides free legal assistance to those interested in starting new nonprofit organizations designed to benefit Orange County's low-income population.



representation on a number of business law related issues, COLAP assists organizations through a legal check-up program. Through this program, volunteer attorneys and law students conduct legal checkups of organizations to make sure they are complying with various state and federal laws. The service allows organizations to address legal issues before they become a problem. If nonprofits do not comply with legal requirements, they may be subject to administrative fines or they can even lose their tax-exempt status. This project helps organizations avoid these consequences.

For more information on COLAP services, please visit our [webpage](http://www.publiclawcenter.org), or contact [Diamond Tran](mailto:Diamond.Tran@publiclawcenter.org).

In addition to providing direct

Upcoming Workshops

“Starting a New 501(c)(3) Nonprofit: The Reality Checklist”

September 16, 2008
November 18, 2008
9am-12pm

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“Legal Topics in Starting a Small Business”

September 17, 2008
5:30-8pm

For more information about these events, contact [Diamond Tran](mailto:Diamond.Tran@publiclawcenter.org). The nonprofit workshops are made possible through a partnership with the Volunteer Center of Orange County. To register, please visit <http://www.volunteercenter.org>

