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They are intended to highlight a specific area of the law. This communication is not legal advice. The reader should consult an attorney to determine how the information applies to any specific situation.

Time to Confirm Arbitration Award as Judgment Clarified

by Heather M. Olson heather.olson@kitch.com

In *Greater Bethesda Healing Springs Ministry v Evangel Builders & Construction Managers, LLC and Vincent Colbert, et al.*, ___ Mich App ___ (2009), the Michigan Court of Appeals, clarified the proper interpretation of the Michigan Court Rules' deadline for confirming an arbitration award with the court. MCR 3.602(I) has been interpreted as requiring a party to confirm an arbitration award within one year after the award was rendered. However, in *Greater Bethesda*, the Michigan Court of Appeals, explained that MCR 3.602(I) requires only that an arbitration award be filed with the court clerk within one year after the award was rendered, and has no bearing on the time period in which the award may be confirmed and entered as a judgment by the court.

Greater Bethesda arose from the construction of a church that Defendant, Evangel was to build for the Greater Bethesda Healing Springs Ministry. Greater Bethesda sued the Defendant, Evangel and its subcontractors for defective workmanship, payment for services not completed and breach of contract together with certain warranties. HMC Mechanical Corp and its owner Leslie Upfall, were subcontractors on the project and were included as defendants in Greater Bethesda's lawsuit. Upon the agreement of all parties, the matter was submitted for arbitration and an award was rendered on September 14, 2005 and filed with the clerk of the court on September 19, 2005. The arbitrator's award provided, in part, that Upfall was liable (jointly with HMC) to Evangel builders in the amount of \$75,000.00. Shortly after the filing of the award with the court clerk, Upfall filed for bankruptcy. On June 27, 2006, the trial court entered judgment on the award. However, after entry of an order by the US Bankruptcy Court, the trial court set aside the judgment and thereafter entered a new (but substantially the same) judgment on July 13, 2007, against Upfall in favor of Evangel Builders. Following its entry, Upfall moved for reconsideration, which the trial court denied and as a result Upfall appealed.

As a part of the subcontractor Upfall's appeal, it argued that the July 13, 2007 judgment was improperly entered, as the arbitration award was not confirmed by the trial court within one year, as required in MCR 3.602(I). The Michigan Court of Appeals affirmed the trial court, holding that the clause "within one year after the award was rendered" in MCR 3.602(I) applied to the filing of the award with the court clerk, not to the confirmation of the award by the court.

This new interpretation of the deadline for confirming an arbitration award as a judgment of the court, is one of several recent changes to the Michigan Court Rules applying to arbitration awards. On January 1, 2008, the Michigan Court Rules were amended to clarify the necessity of filing a complaint for alteration of an arbitration award and make the timing deadlines for vacating, modifying or correcting an award consistent with the time frame under the federal arbitration act, 9 USC 1 *et seq.* As amended, the rule clarifies that a complaint to stay or compel arbitration, or to vacate, modify, or correct an award must first be filed, and then a motion consistent with MCR 3.602(B)(1) must be filed. The amended rule further alters the timing deadlines by requiring that a motion to vacate, modify, or correct an award be filed within 91 days, instead of the previous requirement of 21 days.

The current deadlines for post-arbitration proceedings related to arbitration awards are as follows:

21 days: Where there is no pending action between the parties, a party has twenty-one (21) days from the date the award was rendered to file a complaint with the court to vacate, modify or correct



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an award. A party must file a complaint to vacate, modify, or correct an award where there is no pending action between the parties. Once a party files a complaint to vacate, modify or correct an award, that party must follow its complaint with a motion within the requisite 91 days of the rendering of the award, to vacate, modify or correct the award. MCR 3.602(J),(K).

91 days: A party has ninety-one (91) days from the date the award was rendered to file a motion to vacate, modify or correct an award. However, if the motion is predicated on corruption, fraud, or other undue means it must be filed within 21 days after the grounds are known or should have been known. These deadlines are now consistent with the time frame allowed under the federal arbitration act, 9 USC 1 et seq. MCR 3.602(J),(K).

1 year: A party has one (1) year to file an arbitration award with the court clerk MCR 3.602(I).

6 years: A party has 6 years from the date the award was rendered to confirm an arbitration award as a judgment of the court. MCL 600.5815.

What does this mean for you? A party that has participated in an arbitration, where a final award was rendered must be aware of the specific deadlines for post-arbitration proceedings related to the award. A party seeking to vacate, modify or correct an arbitration award should be aware of the somewhat short deadlines required for filing complaints and motions in order to achieve these results. However, a party simply wishing to confirm an arbitration award is under much less restrictive deadlines. A party seeking confirmation of an arbitration award has one year to file the award with the court clerk and six years to have a court confirm the award as a judgment.

When is an Employee an Independent Contractor, and What Happens if a Subcontractor Misclassifies an Employee as an Independent Contractor?

by Brett J. Miller brett.miller@kitch.com

Many employers and contractors have questions about independent contractors versus employees. Set forth below are some of the most common questions general contractors ask about independent contractor issues.

1. How do I know if my workers are independent contractors or employees?

The Internal Revenue Service uses the "20 Factor" right-of-control test as an analytical tool for determining worker status as outlined in Revenue Ruling 87-41. No one factor on this list is decisive; in fact, all 20 factors will rarely be met. The factors generally refer to the required independence of independent contractors. For example, an independent contractor's freedom from an employer's mandates, training and instructions, set hours of work, requirement of full time status, payment of expenses, and typical controls of how the work is to be performed.

The IRS has also crafted a test, used in conjunction with the 20 factors, that analyzes three broad categories of control: behavioral control, financial control, and the relationship of the parties. Behavioral control focuses on the right to direct or control how the work is done. Financial control focuses on payment methods, services available to the relevant market, un-reimbursed expenses, and the opportunity for profit or loss. Relationship of the parties focuses on how the parties perceive their relationship. Contracts, permanency, and regular business activities are relevant in determining the relationship.

2. What are the penalties if I misclassify an employee as an independent contractor?

If an employer unintentionally misclassifies an employee, the employer is subject to the penalty of 1.5 percent of wages paid, plus interest compounded daily. Where there is a failure to withhold FICA (Social Security) taxes, the employer is subject to the penalty of 20 percent of the FICA tax on the employee, plus interest compounded daily. For failure to report workers' wages or other payments on Forms W-2 or 1099-MISC, the above percentages are doubled.

A willful misclassification can lead to far more serious penalties including having to pay the employer share of Social Security and unemployment taxes, as well as a penalty equal to 5 percent of the tax for each month of the failure to pay, up to a maximum of 25 percent of the tax. Further there can be criminal penalties, including a fine of up to \$10,000 and/or prison time.

Finally, if an employer fraudulently understates its liability for Social Security and unemployment taxes, it is subject to the penalty of 75 percent of the understatement.

3. If the subcontractor is misclassifying employees as independent contractors, can the general contractor be held liable?

Generally, contractors have not been held to be liable for the misclassifications of employees by subcontractors. Courts require a certain level of control over the subcontractor by the contractor to create a "joint employer" relationship. A separate test is used to make such a determination and courts consider, among other things: whether the worker is an integral part of the project; where the worker is doing work and whose equipment he is using; how long the working relationship lasts; how much control is exercised over the worker by the general contractor; whether responsibility for the worker can be passed from one employer to another; whether the general contractor and sub-contractor shifted the worker back and forth to do work for both. *Ling Nan Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 68 (2d Cir. 2003).

Essentially, this means a court will look at the "economic reality" of who really controls the terms and conditions of the working relationship. An example of how this works was seen in the case of *Quintanilla v. A&R Demolition, Inc.*, 2005 U.S. Dist. LEXIS 34033, where a group of construction workers, who were employed by the subcontractor to remove asbestos from a construction site, claimed they were owed overtime wages. The workers also sued the two general contractors who hired the subcontractor alleging a joint employer relationship with the subcontractor. The contracts between the general contractors and subcontractor indicated the subcontractor would be responsible for providing all the labor necessary for the work and require it to supervise its employees. The general contractors, however, also had people on site and instructed the subcontractor's employees on general safety issues. Based on these facts, the court weighed the above joint employer factors and held that the general contractors did not control

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the terms and conditions of employment and that instructions regarding safety did not control the day-to-day operations of the subcontractor. The general contractors were then dismissed from the case.

The bottom line is that it will be very difficult to prove employment liability against a general contractor as long as it allows the subcontractor to handle its own labor without asserting too much control over the subcontractor workers.

See, e.g. <http://www.ncarts.edu/formsprocedures/IRS.htm>

The Impact of the Michigan Medical Marijuana Act on Employment Practices

by Lori Keen Adamcheski lori.adamcheski@kitch.com

In November 2008, Michigan voters overwhelmingly approved Proposition 1 to allow for the use of marijuana for medical treatment for qualifying individuals. As a result of the new Medical Marijuana Act, employers now face uncharted waters when dealing with employees who use marijuana for medical purposes.

Employee drug testing can be tricky in light of the new medical marijuana law. Employers must tread lightly when handling a situation in which an employee tests positive for marijuana during a drug screen. Employers should treat a positive test result for marijuana as it would treat a positive test result for any other prescription medication - verify that there is a valid prescription.

The Act prohibits an employer from disciplining or taking an adverse action against an employee that is properly registered as a legal medical user simply because he/she uses medical marijuana. However, the Act does not permit employees to use or be under the influence of marijuana while at work. Employees under the influence of marijuana may be a serious health and safety risk to themselves and other employees, particularly in a situation where the employee's job duties include driving or operating heavy machinery. Rather, the Act expressly states that it shall not be construed to require "an employer to accommodate the ingestion of marijuana in any workplace or any employee working while under the influence of marijuana."

In 2005, the U.S. Supreme Court held in *Gonzales v. Raich* that the use of medical marijuana is still illegal under federal law, despite the passage of state law that allows the use of medical marijuana by qualified patients. Employers are not required to accommodate an employees' health condition through illegal means. Under *Gonzales*, an employer may be able to argue that it can refuse to consider accommodations for employees using medical marijuana.

Employees may attempt to challenge an employer's decision to terminate or issue discipline on the grounds that the employer improperly considered the use of medical marijuana. Potential causes of action may include claims under the Americans with Disabilities Act or the Michigan Persons with Disabilities Civil Rights Act. While protection under the Michigan Medical Marijuana Act has not been litigated, decisions from other states may provide guidance. In *Ross v. Ragingwire Telecommunications*, the California Supreme Court rejected the plaintiff's claim of disability discrimination, finding that voters did not intend for "the measure to address the respective rights and obligations of employers and employees." The court determined that "[n]o state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law."

Similarly, in *Washburn v. Columbia Forest Products*, the Oregon Supreme Court upheld an employer's right to terminate an employee who tested positive for marijuana even though the employee was a qualified medical marijuana user under Oregon law. The court found that the employee was not disabled and not entitled to an accommodation.

While the decisions in California and Oregon may provide guidance, they are not binding on Michigan Courts. The Michigan Medical Marijuana Act is still in its infancy, it is expected that the courts and legislature may weigh in on these issues in the near future.

What can Michigan employers do to protect itself from liability under the new medical marijuana act? Employers should have a written policy which prohibits employees from using or being under influence of drugs while at work. Employers should also have a written drug testing policy in place and train supervisors to identify when an employee is under the influence of drugs.

If you need assistance establishing or revising your drug-free workplace policy, or if you have questions regarding the Michigan Medical Marijuana law, please feel free to contact me at Lori.Adamcheski@kitch.com.



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Who is this Attorney that Keeps Calling Me?

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Litigation expenses are a cost of doing business and the construction industry, in particular, touches on many different areas of the law. Most contractors are aware of the risks associated with construction and purchase adequate insurance for property, liability, employment, workers compensation and other risks. The primary purpose of insurance is to pay valid claims, whether brought directly by the insured or a third party. However, another benefit of insurance, depending upon the specific language of the policy, is the right of the insured to a defense paid for by the insurance company.

For example, if a non-employee is injured by a slip and fall at a construction site or at the contractor's place of business and subsequently files a lawsuit against the contractor, the suit should immediately be provided to the contractor's liability carrier. Upon receipt, the liability carrier will review the complaint to determine whether the insurance policy is "triggered" and then assign an attorney to defend the lawsuit.

Although some exceptions exist, the contractor's defense attorney is usually chosen by the insurance company because that is what the insurance policy provides. However, since it did not choose its own attorney, the contractor may naturally be leery of the "insurance attorney" and question his loyalty. However, the legal, ethical and practical reality should ease the contractor's fears. Almost always, the attorney hired by the insurance company is selected from an exclusive list of "panel counsel" that have extensive experience with the type of lawsuit brought against the insured. Additionally, Michigan law is very clear that, although the attorney may have been hired by the insurance company, his sole duty of loyalty is to the insured.

With this in mind, a contractor who receives a call from the attorney assigned by the insurance carrier to represent it, should set aside its fears and work with the attorney to develop a cogent and successful defense. After all, payment of defense costs a benefit of insurance and should be utilized when available.

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