



# INTELLIGENT BUSINESS

CAPEHART SCATCHARD ATTORNEYS AT LAW

DECEMBER 2011

## Read the “Fine Print” in your Contracts

by Betsy G. Ramos, Esq.

Many contracts contain standard clauses that lawyers call “boilerplate” clauses that, while seemingly innocuous, could be very significant in any litigation that may arise for a breach of that contract. Contracts often contain choice of venue, choice of law, integration, and arbitration clauses.

The parties to a contract may overlook these standard type clauses while negotiating a contract and may not realize their significance. If litigation arises, however, these provisions will govern what law is to be applied to the dispute, where a lawsuit may be brought, what evidence can be used to determine the terms of the contract, and whether the dispute may be litigated in a court of law or before an arbitrator.

A choice of venue clause prescribes where a lawsuit may be filed. It will typically state that it can only be brought in a certain state and potentially a certain court (i.e., state or federal court). Often big corporations will insert a choice of venue clause which will mandate that any lawsuit be brought in the state where their headquarters are located. However, this state may have no connection to where the transaction has occurred, or where the other party is located, nor even be nearby. It could make it very difficult and expensive for a New Jersey company to have to sue the other party in Wisconsin, for example.

A choice of law clause can also have a very serious impact in any future litigation. Again, if the transaction is occurring in New Jersey and your

company is located in New Jersey, you would prefer that New Jersey law applies to the transaction. Unless you seek counsel in that other jurisdiction to also review your contract, there could be nuances of that state’s law for which you and your attorney will be unfamiliar. It could unknowingly affect some of the terms of your contract and impact on your right to either pursue or defend a lawsuit stemming from that contract.

An integration clause will essentially state that the contract contains the complete agreement between the parties. Any other terms and conditions that the parties had discussed would not be part of the contract. Unless certain exceptions are met, any prior or subsequent discussions or conduct of the parties could not be used to alter any of those written terms. Thus, if your contract contains an integration clause, you need to be certain all of the terms and conditions of your contract are contained within the four corners of the document.

Last, an arbitration clause is often inserted into a contract as either the preferred or required mechanism to resolve any dispute. If it is a mandatory arbitration clause, you would be giving up your right to a trial in the event of a dispute. Arbitrations are not necessarily quicker or cheaper than the expense of a civil lawsuit, plus you essentially give up your right to an appeal on the merits in the event of an adverse decision.

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The bottom line is that you need to review carefully any contract before it is signed, not only for the substantive terms of the contract, but also for the boilerplate clauses that usually show up at the end of the agreement. You should attempt to negotiate those clauses so that it is fairer and more equitable for both parties involved in the transaction. 

## NEW IRS PROGRAM: Should Your Independent Contractor Actually Be An Employee?

by Yasmeen S. Khaleel, Esq.

In 2010, the IRS initiated a three year research program to investigate the methods by which companies classify workers as independent contractors focusing on small and midsize businesses. Its last study of this type was in 1984 which found employers misclassified a total of 3.4 million employees, resulting in an estimated revenue loss of \$1.6 billion (in 1984 dollars). In an effort to encourage compliance with the classification requirements and thereby increase revenue from employment tax, the IRS has also introduced a new voluntary compliance program.

The “The Voluntary Classification Settlement Program” or “VCSP” was released on September 21, 2011. The VCSP is a voluntary program which provides a taxpayer with an opportunity to reclassify workers for employment tax purposes. Those taxpayers who participate in this voluntary program are then entitled to partial relief from the federal employment taxes which will likely arise as a result of the reclassification.

The Internal Revenue Service will consider a worker to be an employee if the taxpayer can control what will be done and how it will be done. A taxpayer generally must withhold federal income tax from the wages paid to an employee and will also withhold a portion of the employees Social Security and Medicare taxes from those wages and then pay a matching amount itself. By contrast, The Internal Revenue Service will consider a worker an independent contractor if the taxpayer has the right to control or direct only the result of the work and not what will be done and how it will be done. The earnings of a person who is working as an independent contractor are subject to Self-Employment Tax.

A taxpayer will have to evaluate the facts and circumstances of its relationship with a worker to determine the appropriate classification. Traditionally, these facts fall into three categories:

1. **Behavioral:** Does the taxpayer control or have the right to control what the worker does and how the worker does his or her job?
2. **Financial:** Are the business aspects of the worker’s job controlled by the payer/employer?

3. Type of Relationship: Are there written contracts between the taxpayer and worker and will the taxpayer offer any form of employee type benefits?

The VCSP furthers the Internal Revenue Service's efforts to enforce taxpayer compliance with the classification of workers. The advantage of the VCSP is that, much like an amnesty, it provides a partial relief from the employment taxes if companies prospectively agree to treat workers otherwise classified as independent contractors as employees. Specifically, a taxpayer will only be liable for 10% of the employment tax liability for the prior tax year without further interest and penalties.

In order to participate in this program, companies must:

1. Meet the eligibility requirements:
  - a. A company must have consistently treated its workers as non-employees;


- b. The company must have filed all required IRS forms 1099 for the past three years;

- c. The company can not be under audit by the IRS in regards to any tax matter;

- d. The company can not be under audit by the Department of Labor or a state government agency or department concerning the classification of those workers.

2. Apply to participate in the VCSP; and

3. Enter into a closing agreement with the Internal Revenue Service.

Careful consideration is required prior to applying for participation in the VCSP. A taxpayer should evaluate the risks of making the required disclosures to the Internal Revenue Service with their accountants, auditors and counsel. The determination in this regard will likely require the taxpayer to perform a worker classification audit to evaluate this opportunity. 



Yasmeen S. Khaleel, Esq. is a Shareholder in Capehart Scatchard's Business and Trust & Estate Group. Ms. Khaleel concentrates her practice in the areas of estate and trust planning and administration, business succession planning, and tax planning. She has also handled estate and trust litigation, and guardianship actions. Additional areas of Ms. Khaleel's practice include business succession planning including entity formation and transactional matters.



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#### TOPICS YOU WOULD LIKE TO SEE ADDRESSED

If you have any suggestions for future articles, please contact our Newsletter Editor, Charles L. (Larry) Winne, Esq., via telephone at 856.914.2071 or via email at [lwinne@capehart.com](mailto:lwinne@capehart.com).

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