

Boulder COUNTY

BAR ASSOCIATION

EMPLOYMENT LAW UPDATE

CONSEQUENCES OF INDEPENDENT CONTRACTOR MISCLASSIFICATION

PATRICIA BELLAC

My workers all agreed to be independent contractors but now, one has left and filed an unemployment claim. I feel betrayed. What do I do?

Colorado Law Definitions – Who is An Employee

Your client's first indication of a problem may be an information request from the Colorado Department of Labor and Employment ("CDLE"). The CDLE presumes that ALL workers are employees unless it is later proven that the worker is both free from direction and control and engaged in an independent business. C.R.S. § 8-70-115. Workers who perform services for a single entity are presumed to be employees to avoid exposing them to the "vagaries" of involuntary unemployment. *Speedy Messenger & Delivery Service v. Industrial Claims Appeals Office of the State of Co.*, 129 P. 3d 1094 (Colo. App. 2015). The Colorado Wage Claim Act and Fair Labor Standards Act similarly presume that workers are employees. In other words, if a once-consenting independent contractor files any sort of employment-related claim, the employer must prove that an independent contractor relationship exists or be liable for retroactive reclassification of the worker and corresponding liability.

BCBA
Annual
Meeting
Page 5

IN THIS ISSUE

EMPLOYMENT UPDATE 1-3

CALENDAR OF EVENTS 4

BCBA ANNUAL MEETING 5

PRESIDENTS PAGE 6

PROFESSIONALISM AND PRO BONO 7

LAWYER ANNOUNCEMENTS 8

CLASSIFIED ADS 9

COURT ANNOUNCEMENTS 9



EMPLOYMENT UPDATE CONTINUED

Written Independent Contractor Agreement

A “totality of circumstances” approach is used to determine proper worker classification. Industrial Claim Appeals Office v. Softrock Geological Services, Inc., 325 P.3d 560 (Colo. 2014). The presence or absence of any one factor is not dispositive of the nature of the relationship. For written agreements, C.R.S. § 8-70-115 (c) provides a list of nine factors, which if incorporated into a written agreement, may create a rebuttal presumption of an independent contractor relationship. Specifically, the contract should state that the company does NOT:

1. Require the individual to work exclusively for it;
2. Establish a quality standard (other than providing plans and specifications)
3. Pay a salary or hourly rate (must pay a fixed or contract rate);
4. Terminate the work during the contract period unless the worker breaches the contract or fails to produce specified results;
5. Provide more than minimal training for the individual;
6. Provide tools or benefits to the individual, except that materials and equipment may be supplied;
7. Dictate the time of performance, except that that parties may agree upon a completion schedule and work hours;
8. Pay the individual personally (instead, makes the checks payable to the trade or business name);
9. Combine his business operations with the individual's business, but instead maintains such operations as separate and distinct.

To create a rebuttal presumption of an independent contractor relationship, a written independent contractor agreement must expressly disclose, in large, underlined or bold-faced type, that the worker is not entitled to unemployment compensation and must pay all federal and state employment taxes. *Varsity Tutors, LLC v. Indus. Claims Appeal Office*, __ P. 3d __, 2017 WL

3184555 (Colo. App., July 27, 2017).

New Standards for Evaluating Independent Contractor Relationships

In recent years, earnest efforts have been made to consider how technology and the internet have changed independent contractor relationships. In the Colorado Court of Appeals case *Varsity Tutors*, the alleged employer provided an online platform to connect tutors with prospective students on its website. Varsity took responsibility for connecting prospective students and tutors. Significantly, Varsity and the tutors agreed upon how much Varsity would pay the tutor in advance of arranging the tutoring relationships, and Varsity charged the student a different rate – around twice as much – as compensation for Varsity. The relationship between Varsity and the tutors was governed by written agreements that contained clear disclaimers limiting the extent of Varsity's control over the tutors. Thus, the only issue was whether the tutors were engaged in an independent business.

The Appeals Panel below had concluded that the workers were NOT engaged in an independent business, by looking at traditional indicia: did they have business cards, websites, actually work for others, have a financial stake in the business etc. From that perspective, the workers would be considered employees, because they lacked those indicia. Of the 22 Colorado employees, most worked a few hours per week and had other “day jobs,” making tutoring more of a hobby business. Nonetheless, considering the totality of the circumstances, the Court of Appeals concluded that the tutors were engaged in independent businesses and were thus properly classified as independent contractors.

In 2016, the unemployment eligibility statute was amended to mandate that the CDLE improve the process of determining worker classification. C.R.S. § 8-70-115(4) was added, requiring the CDLE develop employer guidance, provide additional employer resources, and review and monitor audit results.

EMPLOYMENT UPDATE CONTINUED

Improper Worker Classification Costs

If an independent contractor is later determined to be an employee, a company may be liable for minimum wage and overtime compensation (usually hard to disprove due to a lack of recordkeeping), unemployment and workers' compensation coverage, penalties for failure to provide those insurances, for vacation pay and employment benefits, for the employer portion of Social Security and Medicare taxes, statutory penalties and liquidated damages under state and federal wage and hour laws, and recordkeeping penalties. Recently, the Colorado Supreme Court clarified that upon termination of employment, a worker may only seek wages that accrued within two years of the date of termination, or three years if for a "willful violation." *Hernandez v. Domenico Farms*, ___ P. 3d ___, (Colo. March 5, 2018, *reh'g denied*, April 9, 2018). Prior to *Hernandez*, C.R.S. § 8-4-109 was interpreted by some to allow departing employees to sue for all wages

accrued and unpaid at any time during employment. Effective January 1, 2015, there is a new process for collecting wage claims up to \$7,500.00, and there are new penalties, including one for \$250.00 per employee per month, up to \$7,500 total, for failure to keep itemized payroll records for all employees, for the preceding three years. C.R.S. § 8-4-103(4.5), C.R.S. §§ 8-4-111 and 111.5.

While the *Hernandez* and *Varsity Tutors* decisions provide some good news, the landscape remains dangerous for those seeking to avoid the trappings of the conventional employment relationship.

Patricia Bellac is a Co-Chair of the Employment Law section of the Boulder County Bar Association. She can be reached at psb@psblawfirm.com.

DAVID J. DRISCOLL

Representing plaintiffs in personal injury and insurance bad faith cases with integrity, diligence, and results

HutchinsonBlackandCookLLC

Attorneys at Law

☎ 303.442.6514

921 Walnut Street, Ste 200
Boulder, CO 80302

ONLINE AT:
www.hbcboulder.com



CALENDAR OF EVENTS

Tuesday, May 8

EMPLOYMENT

Recent Developments in Employment Law: Retaliation

Presenter: Chris Leh

Noon @ BCBA Conference Room

\$25 CLE, \$15 New/Young Lawyer

[Register and pay online here](#)

Tuesday, May 8

CIVIL

Functionality of the Amended Rules of Civil Procedure

Presenter: Magistrate Robert Gunning

Noon @ Boulder County Justice Center

\$25 CLE, \$15 New/Young Lawyer

[Register and pay online here](#)

Wednesday, May 9

BUSINESS

Nondisclosure & Assignment Issues Regarding Independent Contractors and Employees

Presenter: Mark Changaris

Noon @ BCBA Conference Room

\$25 CLE, \$15 New/Young Lawyer

[Register and pay online here](#)

Tuesday, May 15

ELDER & TAX LAW

The Right to Remain Frozen

Presenter: Norv Brasch

Noon @ BCBA Conference Room

\$25 CLE, \$15 New/Young Lawyer

[Register and pay online here](#)

Wednesday, May 16

FAMILY

2017-2018 Domestic Relations Case Law Update

Presenter: Tim Mehrkens

Noon @ Justice Center Training Room East

\$25 CLE, \$15 New/Young Lawyer

[Register and pay online here](#)

Wednesday, May 16

IN-HOUSE COUNSEL

Bitcoin and Blockchain Primer for In-House Counsel

Presenter: Micah Schwalb

Noon @ TBD

\$25 CLE, \$15 New/Young Lawyer

[Register and pay online here](#)

Thursday, May 17

CRIMINAL

Legislative Update

Presenter: Carrie Thompson

Noon @ Boulder County Justice Center

\$25 CLE, \$15 New/Young Lawyer

[Register and pay online here](#)

Thursday, May 17

REAL ESTATE

Presentation: TBD

Presenter: TBD

Noon @ BCBA Conference Room

\$25 CLE, \$15 New/Young Lawyer

[Register and pay online here](#)

Thursday, May 17

BANKRUPTCY

Monthly Lunch and Round Table

Noon @ Kathmandu

Friday, May 18

AVAILABILITY OF LEGAL SERVICES

Monthly Lunch and Round Table

Noon @ Boulder County Legal Services

Tuesday, May 22

SOLO / SMALL FIRM

Easy Ways to Reduce Overhead and Become More Efficient in Your Practice

Presenter: Barrett Weisz

Noon @ BCBA Conference Room

[RSVP here](#)

Thursday, May 24

NATURAL RESOURCES / ENVIRONMENT

Mining Claims and Other Magic

Presenter: John Henderson

Noon @ BCBA Conference Room

\$25 CLE, \$15 New/Young Lawyer

[Register and pay online here](#)

Tuesday, May 29

ALTERNATIVE DISPUTE RESOLUTION

Family Law Mediation: Getting to Yes in Separate Rooms

Presenter: Simon Mole

Noon @ Boulder County Justice Center

\$25 CLE, \$15 New/Young Lawyer

[Register and pay online here](#)

JOIN OUR SOFTBALL TEAM!

The BCBA is getting ready for our third season of softball. Our team, Scared Hitless, is a non-competitive way to get together with your colleagues and have some fun. The games are played on Tuesday nights at Stazio ballfields in Boulder (2445 Stazio Drive). The first game will be Tuesday, May 15, time TBD. Please email [Laura](#) here if you would like to join the team!

BCBA ANNUAL MEETING THURSDAY 6/7

Mark your calendars for the Boulder County Bar Association Annual Meeting and Reception on Thursday, June 7 at 5 pm. We will vote on new board members and present awards for the following:

- Ron Porter Award of Merit
- Outstanding Young Lawyer of the Year
- Recognition for our Section Co-Chairs
- Passing of the gavel

We are trying a new location this year to draw more members and make the cost affordable. We will be hosting this event at the Bohemian Biergarten (2017 13th Street) at a member price of \$15. Please join us for a great night of conversation and networking, plus delicious food and drinks!

Register online and pay here



We cordially invite you to join us in
Celebrating 70 Years of Clinical Education at Colorado Law
Thursday, May 24

5:00 - 7:00 p.m.

Gilbert Goldstein Courtyard | [Wolf Law Building](#)
2450 Kittredge Loop Road | Boulder, Colorado

Whether you participated in a clinic or just always wanted to, join us as we reflect on 70 years of education, training, and service to the community. Tour the Robert & Laura Hill Clinical Suite, meet our incredible clinical faculty, and share memories of your clinic experience.

*All are welcome for this fun, family-friendly event,
as we celebrate all we have accomplished together.*

We are particularly pleased to honor the tireless service of Professor Norman F. Aaronson. Come and toast Norm for his nearly 40 years of service to the Clinical Education Program.

Click here to register to attend

PRESIDENT'S PAGE

RENEE EZER

I admit it. I'm a bit of a junkie for books that involve lawyers and the legal system. I'd think that after spending most of my days communicating with lawyers and clients, drafting pleadings, preparing for hearings, or arguing in court, I'd opt for a different storyline in my free time. But that's not how it works. I can't explain why.

Last month I read *A Deadly Wandering*, a book that was published four years ago. Its author is Boulder native son, Matt Richtel (son of the Hon. Murray Richtel). On one level, it's an investigative narrative of a deadly car accident in Utah in 2006 caused by a young man's texting while driving, the subsequent investigation and trial, and how it impacted those affected by the accident. On another level, however, it's a fascinating exploration of cutting-edge neuroscience, the science of attention, and technology's evolving influence on individuals and society over the better part of the past century.

My father told me years ago that multitasking was a myth, and that a person could only effectively concentrate on one thing at a time. Turns out that what he knew intuitively is now backed by science. And yet, it's so very difficult to concentrate on just one thing at a time. As I have aged and technology has evolved, I am even more easily distracted. My desk phone rings and I stop what I'm doing. An alert for an email comes across my computer screen and I glance at it for priority. My iPhone, pings a different sound for a variety of notifications I receive continually throughout a day, and I mentally evaluate each one before I decide whether or not to immediately react or respond. I have become accustomed to making myself available to distraction.

Colorado law permits a driver over the age of 18



to talk on the phone while driving, but not to enter or transmit data on a cell phone (i.e., to send a text message or browse the internet). Drivers under 18 are prohibited from talking on the phone and transmitting data while driving. See, §42-4-239, C.R.S. (2016) This statute is an acknowledgment by the Colorado legislature that distracted driving is hazardous, but also an acknowledgment technology is so pervasive in our lives that it is not reasonable to prohibit talking on the phone while driving. A little bit of distraction while driving is ok, so long as your eyes stay on the road. If I had to, I could argue both sides of this premise like a true believer.

If you haven't read Mr. Richtel's book, I recommend it. It contains a very accessible discussion of cutting-edge neuro-science of attention, relevant to everyone who practices law. There is not one "right answer" or right way to respond to some of the ongoing questions posed by evolving technology and its ever-increasing impact on our brains and neurological processes. It nonetheless merits examination and discussion, awareness and conscious decision-making about the role that technology should play in our day-to-day lives.

Renee Ezer is a shareholder at Dietze and Davis, P.C. She can be reached at 303-447-1375 or ezer@dietzedavis.com.

PROFESSIONALISM ON CALL

May 7	Lee Strickler	303.443.6690
May 14	Mark Langston	303.440.9684
May 21	Meghan Pound	303.443.8010
May 28	Tom Rodriguez	303.604.6030

The Professionalism Committee assists lawyers, clients, and other members of the community with questions or complaints about behavior by lawyers that fails to meet generally accepted standards of professionalism and courtesy, or that is contrary to the BCBA Principles of Professionalism.

The Professionalism Committee does not address allegations of criminal or ethical violations by lawyers, as regulated by the Colorado Rules of Professional Conduct, and any such violations should be addressed to the Office of Attorney Regulation Counsel.

BOULDER COUNTY FREE LEGAL CLINIC

The dates have been set for the 2018 Free Legal Clinics at the Sacred Heart of Jesus Church (2312 14th Street) and the Longmont Senior Center (910 Longs Peak Ave) from 5:30 - 7:30 pm. Volunteers are always needed. Please contact Laura at laura@boulder-bar.org if you can help in Boulder or Lafayette, or susan.spaulding@longmontcolorado.gov if you can help in Longmont.

Boulder: June 21

Longmont: May 22, August 28

Lafayette: July 17, October 16

PRO BONO CORNER

Interested in a Pro Bono case? Please call Erika at 303-449-2197. CLE credits available for pro bono service.

PRO BONO REFERRALS

Seven cases were referred during the month of March. Thank you to the following attorneys:

James Carpenter
Kurt Hofgard
Jennifer Huston
Chris Jeffers
Gary Merenstein
Bruce Wiener

PRO SE VOLUNTEERS

Shawn Ettingoff
Kathleen Franco
Tucker Katz
Zach LaFramboise
Michael Morpew
Alice Robbins
Lila Sol
Todd Stahly

BCAP VOLUNTEERS

There were no requests for a referral for the Boulder County AIDS Project in February.

LAWYER ANNOUNCEMENTS

HutchinsonBlackandCookLLC

Attorneys at Law

HBC Congratulates:

Christopher W. Ford
Personal Injury-Plaintiff

Baine P. Kerr
Medical Malpractice-Plaintiff

Robert A. Schuetze
Personal Injury-Plaintiff

Glen F. Gordon
Personal Injury-Plaintiff

On Their Selection As

COLORADO SUPER LAWYERS® for 2018

www.hbcboulder.com



921 Walnut Street | Suite 200 | Boulder, CO 80302
Telephone 303.442.6514 | Fax 303.442.6593

HutchinsonBlackandCookLLC

Attorneys at Law

HBC Congratulates:

William D. Meyer
Business Litigation

Brad Peterson
Construction Litigation

Daniel D. Williams
Business Litigation

Constance Tromble Eyster
Estate & Probate

On Their Selection As

COLORADO SUPER LAWYERS® for 2018

www.hbcboulder.com



921 Walnut Street | Suite 200 | Boulder, CO 80302
Telephone 303.442.6514 | Fax 303.442.6593



DIETZE AND DAVIS, P.C.
ATTORNEYS AT LAW

The attorneys and staff of Dietze and Davis, P.C.
congratulate our Managing Shareholder

David J. Thrower

on his appointment as

Municipal Judge for the Town of Estes Park

Mr. Thrower will continue to serve as Municipal Judge
For the Town of Superior,
Deputy Judge for the Town of Louisville, and
Relief Judge for the City of Longmont.

In addition to his judicial duties,
David continues to practice at
Dietze and Davis, P.C. in the areas of
estate planning, business and real estate.

His colleagues are proud of his hard work
and accomplishments!

CLASSIFIED ADS

LITIGATION SPECIALIST. Civil. Criminal. CJA approved vendor. Trial support. Mobile notary. Roz Lynn Dorf, M.A. Freelance Paralegal Services 303.494.6935

CONTRACT ATTORNEY POSITION: Bridge to Justice (B2J) is seeking a contract attorney to join our agency. B2J is a nonprofit organization based in downtown Boulder providing reduced-rate civil legal services to low- and moderate-income individuals. This is a part-time position (5-10 hours per week) with an opportunity for growth. The ideal candidate would be a Colorado licensed attorney with 10+ years of experience in family law, strong communication and organizational skills, and a demonstrated commitment to pro bono/low bono legal services. Please visit our website at www.boulderbridgetojustice.org for more information about our services. Please send a cover letter, resume, and brief writing sample to Bruce Wiener, Executive Director, at bruce@boulderbridgetojustice.org.

GREAT VIEWS – CLOSE TO DOWNTOWN; TRAILS IN YOUR BACKYARD: Architecturally unique, 250 Arapahoe was built indigenously. best of both worlds: mountain feel; urban location. Synergistic opportunity

for sole practitioner attorney interested in business formation/litigation legal referrals from well-established Boulder firm. Single office available in long standing law firm/multi-attorney office. 1 year minimum lease. Amenities include: Kitchen, Outdoor patio, Showers, Free parking. \$1100 monthly, includes utilities. Contact Mitzi 303-443-6690

SEEKING A WELL-ROUNDED PARALEGAL with family law experience. Must possess excellent proofreading skills, the ability to work well under pressure, and the ability to multi-task while exhibiting sharp attention to detail. Must be a team player and willing to take on additional tasks as needed. Proficiency with Microsoft Office and Colorado/Federal e-filing systems required. Contact Itaylor@dietzedavis.com

OFFICE SHARE one or two offices in spacious new suite @ 95th & Arapahoe. Easy drive from anywhere in Boulder or Weld counties. Plenty of parking, conference room, all office amenities, receptionist included. Many good area restaurants and coffee shops to take your clients. Contact gail@oshlaw.com or 303-442-0165 for details.

COURT ANNOUNCEMENTS

Due to scheduling Boulder County Courts will not be scheduling FED and Name Change hearings at the Boulder and Longmont locations on the dates listed below:

BOULDER: November 23, 2018, December 21, 2018, and January 4, 2019,

Longmont: August 24, 2018, November 23, 2018, December 21, 2018, December 28, 2018, January 4, 2019

THE BCBA CONFERENCE ROOM

AVAILABLE TO BOOK



Please contact
Kyle@boulder-bar.org
at the bar offices to
reserve your space.
Rates are \$25 per
hour. 303-440-4758

Boulder^{COUNTY} BAR ASSOCIATION

THE BCBA NEWSLETTER IS A MONTHLY ELECTRONIC PUBLICATION BY THE BOULDER COUNTY BAR ASSOCIATION. ARTICLES BY GUEST LAWYERS MAY NOT BE REPRODUCED WITHOUT PERMISSION FROM THE BOULDER COUNTY BAR ASSOCIATION OR THE AUTHORS.

COMMERCIAL ADVERTISING INFORMATION IS AVAILABLE BY CONTACTING
laura@boulder-bar.org
OR THE BAR'S WEBSITE
www.boulder-bar.org



LAWPAY
CREDIT CARD PROCESSING

PAYMENT PROCESSING,
EXCLUSIVELY
FOR ATTORNEYS.

BOULDER COUNTY BAR ASSOCIATION
Proud Member Benefit Provider

1.95% per transaction | No swipe required | No equipment needed

www.lawPay.com/bcba | 866.376.0950

AffiniPay is a registered ISO/MSP of BMO Harris Bank, N.A., Chicago, IL