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INSIDE

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U.S. Supreme Court limits exhaustion of administrative remedies doctrine

The United States Supreme Court has interpreted section 10(c) (5 U.S.C. § 704) of the Administrative Procedure Act (APA) as significantly limiting the power of federal courts to require persons to exhaust available administrative remedies before seeking judicial review. Specifically, the Court ruled that section 10(c) "effectively codified the doctrine of exhaustion of administrative remedies," and that, "where the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Darby v. Cisneros*, No. 91-2045, 1993 U.S. LEXIS 4246, *30 (June 21, 1993).

The Court's holding in *Darby* is a major development in federal administrative law. As the Court noted in *Darby*, "it has taken over 45 years since the passage of the APA for this Court definitively to address . . . the effect of § 10(c) on the general exhaustion doctrine." *Id.*, 1993 U.S. LEXIS 4246 at *16 (citations omitted). In the meantime, the judicially-created exhaustion doctrine became "well-established in administrative law jurisprudence" as "both an expression of administrative autonomy and a rule of sound judicial administration." Bernard Schwartz, *Administrative Law* § 8.33 (1992) (footnotes omitted). The doctrine dictated, in essence, that "[j]udicial review of agency action will not be available unless the party affected has taken advantage of all the corrective procedures provided for in the administrative process." *Id.* As the exhaustion doctrine developed and was applied prior to *Darby*, § 10(c) of the APA was "'customarily overlooked.'" *Darby*, 1993 U.S. LEXIS 4246 at *16 (citing 4 Kenneth C. Davis, Administrative Law Treatise § 26.12 (1983)).

In *Darby*, the petitioners sought review in federal district court of an administrative law judge's (ALJ) decision to debar them for eighteen months from participating in Department of Housing and Urban Development (HUD) procurement contracts and from any nonprocurement transaction with any federal agency. HUD initiated the debarment proceedings alleging the petitioners had used improper financing practices in connection with a mortgage insurance program administered by HUD.

Under the applicable HUD regulations, the ALJ's decision was final unless the Secretary of HUD or the Secretary's designee decided to review the decision. Any party to the decision could request the Secretary's review within fifteen days of receipt of the decision, and the Secretary had thirty days from receipt of the request for review, subject to extensions, to decide whether to review the ALJ's decision. *See* 24 C.F.R. § 24.314(c) (1992).

No party to the debarment proceedings sought review by the Secretary, and the petitioners filed an action for injunctive and declaratory relief in federal district court. The government moved to dismiss the petitioners' complaint on the grounds that the

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Seventh Circuit rules that price later contracts qualify for installment sales treatment.

The Seventh Circuit ruled that price later contracts qualify for installment sales treatment under section 453 of the Internal Revenue Code in *Applegate v. Commissioner*, 980 F.2d 1125 (7th Cir. 1992). Producers typically store grain rather than sell their grain immediately after harvest because of historical low prices at harvest time. However, with large crops, storage becomes a problem. To address this issue, the price later contract concept evolved. As a result, price later contracts are common when large crops are produced and storage is a problem. Price later contracts allow grain to be moved into the marketplace, but the seller obtains the right to select a price later. Price later contracts are not actively traded in a secondary market and are not

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petitioners had failed to exhaust their administrative remedies by not requesting review by the Secretary. The district court denied the motion to dismiss on the grounds that the administrative remedy was inadequate and pursuing it would have been futile. Subsequently, the district court granted the petitioners' motion for summary judgment. On appeal, the court of appeals reversed, holding that the denial of the government's motion to dismiss was improper.

The United States Supreme Court framed the issue presented to it as "whether federal courts have the authority to require that a plaintiff exhaust available administrative remedies before seeking judicial review under the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq., where neither the statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review." *Darby*, 1993 U.S. LEXIS 4246 at *3. In analyzing the APA, the Court focused on section 10(c), captioned "Actions Reviewable," which provides as follows:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

The petitioners argued, and the Court agreed, that the last sentence in section 10(c) "means that a litigant seeking judicial review of final agency action under the APA need not exhaust available administrative remedies unless such exhaustion is expressly required by statute or agency rule." *Id.*, 1993 U.S. LEXIS 4246, at *13, 18. The Court rejected the government's argument that "§ 10(c) is concerned solely with timing, that is when agency actions become 'final,' and that Congress had no intention to interfere with the courts' ability to impose conditions on the timing of their exercise of jurisdiction to review final agency actions." *Id.* at *14.

Noting that section 10(a) of the APA (5 U.S.C. § 702) provides "the general right to judicial review under the APA," the Court characterized section 10(c) as providing "when such review is available." *Id.* at *18. Addressing the first and last sentences of section 10(c) separately, the Court read the first sentence as limiting "the availability of the doctrine of exhaustion of administrative remedies to that which the statute or rule clearly mandates." *Id.* at *18-19. Thus, as expressed by the Court, "[w]hen an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule, the agency action is 'final for purposes of this section' and therefore 'subject to judicial review' under the first sentence [of § 10(c)]." *Id.* at *18.

The Court noted that the last sentence of section 10(c) refers "explicitly to 'any form of reconsideration' and 'an appeal to superior agency authority,'" thus reflecting that "Congress clearly was concerned with making the exhaustion requirement unambiguous so that aggrieved parties would know precisely what administrative steps were required before judicial review would be available." *Id.* at *19. Accordingly, the Court reasoned that "[i]f courts were able to impose additional exhaustion requirements beyond those imposed by Congress or the agency, the last sentence of section 10(c) would make no sense." *Id.*

The Court concluded that "Congress effectively codified the doctrine of exhaustion of administrative remedies in sectior 10(c)." *Id.* at *30. While recognizing that "the exhaustion doctrine continues to apply as a matter of judicial discretion in cases not governed by the APA," the Court held that

> where the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review. Courts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become 'final' under § 10(c).

Id.

Finally, the Court observed that "[a]gencies may avoid the finality of an initial decision, first, by adopting a rule that an agency appeal be taken before judicial review is available, and, second, by providing that the initial decision would be "inoperative" pending appeal. Otherwise, the initial decision becomes final and the aggrieved party is entitled to judicial review." *Id.* at *28-29.

The *Darby* decision is likely to prompt federal agencies, including the USDA, to review their administrative appeal regulations. Currently, for example, the appeal regulations of the USDA's Agricultural Stabilization and Conservation Service (ASCS) do not require aggrieved parties to exhaust their administrative remedies before seeking judicial review. *See* 7 C.F.R. pt. 780 (1993); *see also* 57 Fed. Reg. 43,939-943 (1992) (proposed amendments to 7 C.F.R. pt. 780). Moreover, ASCS determinations generally are not inoperative pending completion of the administrative appeal process. *See* 7 C.F.R. pt. 1403 (1993); 58 Fed. Reg. 33,030-035 (1993) (proposed rules to be codified at 7 C.F.R. pt. 792). While pre-*Darby* decisions have held that the failure to exhaust the ASCS administrative appeal process precludes judicial review, *see, e.g., Madsen v. Dep't of Agric.*, 866 F.2d 1035, 1037 (8th Cir. 1989), those decisions are now questionable.

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CONFERENCE CALENDAR

Land Use Institute

August 18-20, Stouffer Madison Hotel, Seattle
Topics include: zoning and land use development for environmentally sensitive areas; wetlands regulations and the Clinton administration.
Sponsored by: ALI-ABA, Fla. Atlantic U./Fl. Int. U. Joint Center for Environmental and Urban Problems.
For more information, call 1-800-CLE-NEWS.

Price later contracts/continued from page 1

generally accepted as collateral for loans.

Calvin and Erma Applegate own farmland that was leased under crop shares rental agreements for 1984. As per the terms of the leases, the Applegates received one half of the crops at harvest and then sold their share utilizing price later contracts. The price later contracts did not specify a price, but provided that the fixing of the price was deferred and could be established by the Applegates anytime within one year of the execution date.

Upon the execution of the price later contracts, the Applegates did receive some cash and they reported that cash on their 1984 return. However, the Appelegates did not report the entire value of the grain in 1984. The Commissioner determined that the amount the Applegates could have received from the sale of the grain on the date the price later contracts were executed should have been included on their 1984 return.

Before the Tax Court, the Applegates successfully argued that the price later contracts were installment sales under section 453 of the Code. The Service countered that because the Applegates had the right to demand immediate payment, they realized income in the amount of the bid price on the day the price later contracts were actually executed. The tax court rejected the Service's position and held that there had not been full payment in 1984. The tax court stated that the price later contracts were installment contracts because there was receipt of at least one payment after the close of the taxable year in which the grain was sold.

On appeal, the Seventh Circuit affirmed the tax court's decision and characterized the issue as whether the price later contracts were evidence of indebtedness payable on demand. The Seventh Circuit found that price later contracts are not evidence of indebtedness payable on demand because the total selling price is not known until the decision was made to price the grain. On the other hand, a typical indebtedness payable on demand contract is for a sum certain. The Seventh Circuit affirmed the tax court and held that price later contracts qualified for installment sales treatment under section 453 of the Code. Farmers, landlords, and agricultural advisors need to be aware of this decision and consider installment sales treatment for price later contracts.

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ASCS denial of disaster benefits upheld

A federal district court has upheld an ASCS decision denying benefits under the Disaster Assistance Act of 1988, 7 U.S.C. § 1421, note §§ 201-204, even though the ASCS included funds belonging to others in determining that the applicant's "qualifying gross revenues" exceeded the Act's eligibility limit. *Doane v. Espy*, No. 91-C-852-C (W.D. Wis. July 20, 1993). The court also followed the decisions of *Vculek v. Yeutter*, 754 F. Supp. 154 (D.N.D. 1990), *aff'd without op.*, 950 F.2d 727 (8th Cir. 1991), and *Haubein Farms, Inc. v. Dep't of Agric.*, No. 92-0482, 1993 U.S. Dist. LEXIS 8573 (D.D.C. Apr. 29, 1993), in upholding the ASCS's regulations implementing the financial eligibility requirements of the Act. *See 1989 Disaster Assistance Act Financial Eligibility Regulations Upheld*, 10 Agric. L. Update, May, 1993, at 1.

Section 231(a) of the Disaster Assistance Act of 1988 limits eligibility to persons who do not have "qualifying gross revenues" in excess of $ 2,000,000 in the most recent tax year preceding the date of the application for benefits. The Act specifies that the applicant's "qualifying gross revenues" will be either the applicant's "gross revenue" from agricultural production or the applicant's "gross revenue" from all sources, depending on the source of the "majority of the [applicant's] annual income." *See* Disaster Assistance Act of 1988, Pub. L. No. 100-387, tit. II, § 231, 1988 U.S.C.C.A.N. (102 Stat.) 924, 944 (codified at 7 U.S.C. § 1421 note, § 231). The ASCS's regulations implementing the Act's financial eligibility criteria do not distinguish between "gross revenue" and "annual income" and consider only the applicant's gross revenue ("gross income") in determining eligibility. *See* 7 C.F.R. § 1477.3(g) (using the phrase "annual gross income" instead of "qualifying gross revenue").

In 1987, the year preceding his application for disaster assistance, Russell Doane's corn and red kidney bean farming operations had gross revenues of $1,962,154.03. Mr. Doane also owned a majority interest in the Chippewa Valley Bean Company (CVB). His majority interest in CVB resulted in his being treated as one "person" with CVB under the Act. *But see Hanson v. Madigan*, 788 F. Supp. 403 (W.D. Wis. 1992), *appeal filed*, No. 92-1918 (7th Cir. Apr. 16, 1992).

CVB was a licensed public warehouse for the storage and handling of kidney beans. In addition to storing and handling kidney beans, it acted as a marketing agent for producers who desire to sell their kidney beans. As a marketing agent, CVB negotiated a sales price with a potential buyer which was then communicated to the beans' owner for the owner's acceptance or rejection. If the producer accepted the price offered by the buyer, CVB shipped the beans. The buyer sent the purchase price to CVB, which then deducted its selling commission and expenses and remitted the balance to the producer. Whenever CVB acted as a marketing agent for a producer of kidney beans, the producer maintained title to the beans until they were sold. In 1987, CVB, acting as a marketing agent, collected over $2.8 million on behalf of its clients.

In addition to the sale of CVB-owned beans, Russell Doane had non-farm revenue from the retail sale of a combine as an authorized dealer. His total non-farm revenue, including sales of CVB-owned beans, CVB's commissions and fees, and the combine sale, was less than half of his gross revenue from farming ($1,962,154.03). Thus, he contended that because the majority of his gross revenue was from farming, his "qualifying gross revenues" under the Disaster Assistance Act of 1988 were his gross revenues from farming, a sum less than the $2,000,000 eligibility limit.

The ASCS, however, treated all of CVB's revenue from bean sales, including the sale of beans owned by others, as Russell Doane's gross revenue. Thus, according to the ASCS, the majority of Mr. Doane's gross revenue was from non-farm sources. In those circumstances, the ASCS's regulations deem the gross revenue from all sources to be the qualifying sum, and, on that basis, the ASCS disqualified Mr. Doane on the grounds that his qualifying "annual income" exceeded $2,000,000.

Before the district court, the Secretary maintained that it was proper to include funds belonging to others in Mr. Doane's qualifying revenue because CVB had "control" over those funds and because it would be administratively inconvenient for the ASCS to "investigate all business operations to trace the path of all goods and proceeds going in and coming out." *Doane*, slip op. at 23. Mr. Doane countered that including other people's money in his qualifying gross revenues was arbitrary and capricious because Congress intended that the Act protect the livelihood of the producer seeking benefits and that using funds that did not belong to the applicant to disqualify him was inconsistent with that intent. He disputed the ASCS's claims of administrative inconvenience, also asserting that administrative inconvenience did not excuse adherence to congressional intent. Finally, he contended that the ASCS's policy of including the revenues collected by a marketing agent on the behalf of others was inconsistent because the ASCS made an exception for stock-

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Determining whether a worker is an employee or an independent contractor

By John C. Becker and Robert G. Haas

Introduction

The significance of the distinction between an employee and an independent contractor is found in the number of duties, obligations and responsibilities which are affected by the determination. For example, does the Immigration Reform and Control Act requirements apply to hiring independent contractors? What is an employer's obligation in regard to the payment of minimum wages and overtime pay to an independent contractor? Must an employer withhold income, FICA and unemployment compensation taxes from wages paid to an independent contractor or pay the employer's share of these taxes? If an independent contractor is injured while performing the duties and responsibilities assigned by the employer, will workers' compensation benefits be available to the injured worker? What responsibility does an employer have for personal injuries or property damage caused by an independent contractor in the course of performing the assigned task?

This article will explore the answers to these questions by examining the standards used at common law and the standards and tests used under several federal laws to distinguish between workers as employees and independent contractors. As the text will point out, however, several other important issues will not be discussed in this article, namely those which depend on other federal laws or state law factors to draw their conclusion.

The common law test

In the modern work environment the distinction between an employee and an independent contractor is a complex one that requires a detailed evaluation of the work relationship. At common law, however, rules for determining a worker's status as an employee focused on identifying the right of a master to control the worker's physical conduct in the performance of a service. Independent contractors, in comparison, were not subject to control, or the right to control, by a master in the performance of a service (Restatement (Second of Agency) Section 2 (1958)).

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Withholding employment taxes under the Internal Revenue Code

The most frequently cited statutory standard for distinquishing between an employee and an independent contractor involves an employer's obligation to withhold income and FICA taxes from an employee's wages. Under current law (IRC sections 3121(d), 3301 and 3401) and regulations (Treas. Regs. 31.3121(d)-1(c), 31.3306(i)-1 and 31.3401(c)-1) the relationship of employer and employee is generally considered to exist when the person or persons for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. An employee is a person who is subject to the will and control of an employer not only as to what is done but also how it is done. It is not necessary that the employer *actually direct or control* the manner in which the services are performed. It is sufficient if the employer has *the right to do so* (Rev. Rul. 87-41, 1987-1 C.B. 298). If an employer-employee relationship exists, whatever designation or description is given to the relationship by the parties which is other than employer-employee is of no consequence. Id. Therefore, if an employer-employee relationship exists, terms such as partner, co-adventurer, agent, independent contractor, or the like will not be controlling of the classification.

Revenue Ruling 87-41 lists 20 factors or elements which can be used as guidelines for determining whether sufficient control is present in an employment situation to establish an employer-employee relationship. Among the 20 factors, the degree of importance of each factor varies according to the occupation performed and the factual context in which the services are performed. The 20 factors are described as follows:

1. *Instructions.* Control is present if the person or persons for whom the services are performed has the *right* to require compliance with instructions.

2. *Training.* Training a worker through various means indicates the person for whom the services are provided wants the services to be provided in a particular method or manner.

3. *Integration.* Integration of the worker's services into the business operations of the person for whom the services are performed generally shows that the worker is subject to direction and control. Should the success or continuation of a business depend upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business.

4. *Rendering services personally.* If services must be performed personally, it is presumed that the person for whom the services are to be performed is interested in the methods used to accomplish the result as well as in the results.

5. *Hiring, supervising and paying assistants.* If the person for whom the work is performed hires, supervises and pays assistants to work with the person who provides the service, this factor generally indicates control over the workers on the job. If the person performing the work hires, supervises and pays the assistants, that factor is indicative of an independant contractor relationship.

6. *Continuing relationship.* A continuing relationship, even one which occurs at frequent yet irregular intervals, is indicative of an employer-employee relationship.

7. *Set hours of work.* The establishment of set hours of work by the person or persons for whom the services are provided is a factor indicating control

8. *Full time required.* A worker who must devote substantially full time to providing services to another person is impliedly under the control of the person for whom the services are provided, particularly in regard to opportunities to provide services to other persons.

9. *Doing work on the employer's premises.* Work that is performed on the premises of the person for whom the services are performed is generally under the control of that person. However, this fact alone is not indicative of the status of an employee.

10. *Order of sequence set.* A person who establishes the order or sequence in which work is to be done generally has the authority to control the person aproviding the service.

11. *Oral or written reports.* Requirements imposed on workers to provide regular or written reports to the person for whom the work is provided is indicative of a degree of control over the worker.

12. *Payment by the hour, week, month.* Payment by the hour, week, or month generally points to an employer-employee relationship, *provided* that the method of payment is not just a convenient way to pay a lump sum agreed upon as the cost of a job.

13. *Payment of business and/or travel expenses.* Payment of an employee's business and/or travelling expenses is generally indicative of an employer-employee relationship.

14. *Furnishing of tools and materials.* Supplying significant tools, materials, and other equipment to the worker, tends to show the existence of an employer-employee relationship.

15. *Significant investment.* Investment by a worker in the facilities used to perform the services is indicating of an independent contractor relationship.

16. *Realization of profit and loss.* A worker who can realize a profit or suffer a loss as a result of the worker's actions is generally an independent contractor. However, the risk that a worker will not receive payment for services provided is a risk that is common to both employees and independent contractors.

17. *Working for more than one firm at a time.* Performing more than de minimis services for a multitude of unrelated persons at the same time is generally indicative of an independent contractor.

18. *Making services available to the general public.* Making services available to the general public on a regular and consistent basis is indicative of an independent contractor.

19. *Right to discharge.* Having the right to discharge a worker is indicative of the right of an employer.

20. *Right to terminate.* If a worker has the right to end his or her relationship with the person to whom the work is provided at any time and without incurring liability, that factor is indicative of an employer-employee relationship.

Fair Labor Standards Act

The Fair Labor Standards Act, as amended, (29 U.S.C. section 201 et seq.) governs minimum wages, overtime pay, employer record-keeping and child labor issues and is enforced by the United States Department of Labor's Wage and Hour division (USDOL). In determining whether an individual is an employee or an independent contractor under the Act, federal courts and the USDOL apply what has been called the "Economic Reality" test (*Bartel v. Birmingham,* 332 U.S. 126, 130, 67 S. Ct. 1547,1550, 91 L. Ed. 1947 (1947)). Under this test the following six factors are applied:

1. The degree to which the worker has the right to control the results to be accomplished (What shall be done?) and the manner in which the work is to be performed (How shall it be done?);

2. The degree to which the employer determines the worker's opportunity for profit and loss;

3. The degree of skill, training, and independent initiative required to perform the work;

4. The permanency, exclusivity, and duration of the working relationship;

5. The extent to which the work is an integral part of the employer's business, and

6. The extent of the worker's investment in equipment or materials required for his or her task.

Among the six specific factors, no single factor is considered to be controlling. Courts generally turn their attention to the totality of the circumstances of the work relationship to determine a specific worker's status. In applying the factors, the central question to be answered is, "As a matter of economic reality does the worker depend on someone else's business for the opportunity to render service or depend on his or her own business to render the same service?"

In *Real v. Driscoll Strawberry Associates, Inc,* 603 F. 2d 748 (9th Cir. 1979), the Ninth Circuit reversed a district court's grant of summary judgment on the defendant's motion in a suit filed by a group of Mexican strawberry growers and pickers. Driscoll Strawberry Associates, Inc. (DSA) held patents on several varieties of strawberries. DSA granted Donald J. Driscoll a license to grow a crop of DSA's patented plants and the right to sub-license the growing of the crop to others, subject to DSA's approval of the sub-licensees. At all times, DSA exclusively owned the plants that it delivered to Donald Driscoll and the crop grown from the plants. Driscoll entered into a sub-license agreement with the Mexican workers to grow the strawberries on a described plot of land owned or leased by Driscoll. The sub-licensees agreed to furnish the labor necessary to care for the land and plants during the growing season, to harvest the strawberry crop, and to sort, grade and pack the berries for DSA. Sub-licensees could hire any additional workers needed to fulfill the sub-license agreement. As compensation for their services, sub-licensees received a fixed percentage of fifty-five percent of the net proceeds actually received by Donald Driscoll from DSA. Throughout the agreement between Driscoll and the sub-licensees, the sub-licensees are described as independent contractors and neither Driscoll nor DSA assume any rights of supervision and control over the growing of the strawberry crop. Driscoll maintained control over the result of the work assigned to the sub-licensees however, but not over the means by which the results were accomplished by the sub-licensees.

Upon reviewing affidavits submitted by the sub-licensees the court found several facts to be significant in reaching its conclusion that genuine factual issues existed whether the sub-licensees were Driscoll's employees and not independent contractors as described in the agreement. These factors included:

1. The company could fire a grower at any time, especially if the worker did not do what the company recommended.

2. The growers' opportunity for profit or loss depended more on the company's skills in developing different varieties of strawberries, analyzing soil and pest conditions and marketing the strawberries correctly, than it did upon the growers' own judgment in weeding, dusting, pruning and picking the berries.

3. The growers' investment in light equipment was minimal in comparison with the total investment by the company in

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heavy machinery and growing supplies.

4. The growers had no special technical knowledge or skill; rather their efforts consisted primarily of physical labor.

5. The growers were an integral part of the company's strawberry growing operation rather than part of an independently viable enterprise.

6. The growers were completely dependent economically upon the company's provision of strawberry plants and the marketing of the strawberry harvest.

In *Donovan v. John Jay Aesthetic Salons*, 26 W.H. 823 (D.C. La. 1988), the court considered whether lessees of beauty parlors were employees or independent contractors. John Jay was a business offering hair dressing and cosmetic services at outlets located throughout Louisiana. Individuals who worked for the company were classified as hairdressers, manicurists, cosmetologists, and shampoo maids. John Jay considered its shampoo maids to be independent contractors. When individuals began working for John Jay they had the option of signing either a lease or an employment agreement, even though their functions and duties would be essentially the same regardless of the document they signed and the status they assumed. In the employment agreement the following language appeared, "An employee performs his or her duties faithfully subject to the direction, supervision, control, rules and regulations of the employer." Employees were paid either a straight salary or a straight commission based on a set percentage of the business which they performed.

If a worker signed a lease agreement, the worker would be given working space, but left to their own to determine routine, number of hours worked per day, and choice of days worked per week. John Jay provided the basic facilities, but the workers were responsible for furnishing their own equipment and hand tools. A percentage of each individual lessee's gross receipts was paid to John Jay as rental for the use of the space that was provided to them.

The USDOL argued that notwithstanding the provisions of the lease agreements, all lessees should be considered employees rather than independent contractors, since lessees and employees performed essentially the same function as their employee counterparts. In applying the economic reality test, the court examined the relationship between John Jay and its alleged employees. Two factors were relied upon to determine the status of the alleged employees, the specialization of the work involved and the degree of control exercised by the employer. Applying these factors, highly skilled lessees were classified as independent contractors, while lower skilled workers were classified as employees. Two facts were viewed as significant by the court. First, the work of a hairdresser or cosmetologist required special skill and training, which hairdressers and cosmetologists used along with their personal judgment to build a loyal clientele. Second, hairdressers and cosmetologists controlled their own work and were flexible in setting their schedules. No withholdings were taken from their earnings as each was responsible for paying their own taxes and appropriate insurance.

Secretary of Labor v. Lauritzen, 835 F. 2d 1529 (7th Cir. 1987) cert. den. 488 US 898, 109 S.Ct. 243; reh. den. 488 US 987, 109 S.Ct. 544, involved migrant workers who came to farms in Michigan and Wisconsin to harvest pickles. The head of a family of migrant workers would contract with the farm operator to harvest particular fields of pickles. Decisions as to when and how to pick the pickles were made by the workers. Farm operators occasionally visited the fields to check on the families, the crops, and to supervise activities for which the operators were responsible, such as irrigation and pesticide application. Farm operators supplied irrigation and pesticides when the workers deemed it necessary to do so. As compensation the workers received 50% of the proceeds from the sale of the pickles to commercial processors. Under this arrangement workers had the incentive to exercise care for both the plants and the pickles, thereby benefiting both the workers and the farm operators. The only tools needed to do the job were gloves and pails to hold the pickles.

The USDOL sought to classify the workers as employees of the farm operator under the Fair Labor Standards Act. Referring to the economic reality test as the basis for its decision *Lauritzen* concluded the workers were employees.

In regard to the first factor, the degree of control over the manner in which the work is performed, the workers testified they considered the operator as "the boss" and believed the operator had authority to fire them. The court found that the operator had the right to exercise control over the workers and the entire pickle-farming operation, including the harvesting portion of it.

In regard to the second factor, the workers' opportunity for profit or loss, the court noted that although the profit opportunity available to the workers may depend on how good a pickle picker is, there is no corresponding possibility for migrant worker loss. The employees lacked an investment in the business. Without an investment, the workers risked nothing, while the operator risked a significant amount of capital in the business. If the price of pickles paid by processors fell sharply, the workers faced a loss of income, but not a loss of investment.

In regard to the third element, the workers' investment in equipment and material to perform the job, the workers' only investment involved gloves. Everything else, from farm equipment, land, seed, fertilizer, and insecticide to the living quarters was supplied by the growers. The operator's investment, therefore, was significantly higher in terms of dollars. This disparity in terms of dollars invested was significant in concluding the small investment by the workers is indicative of an employee relationship.

In regard to the fourth factor, the degree of skill required of workers to do the job, a worker must develop some specialized skill in order to recognize which pickles to pick when, but the development of occupational skills is no different from that which any good employee in any line of work must do. The existence of the skills is significant, but they are skills which are essentially the same as those of other agricultural workers.

The fifth factor, the permanency and duration of the work relationship, involves the frequency with which workers return from year to year to pick in the same fields. Although seasonal businesses necessarily hire only seasonal employees, the seasonal nature of the employment does not convert seasonal employees into seasonal independent contractors. The court concluded that however temporary the relationship may be, it was still permanent and exclusive for the duration of the harvest season. The percentage of workers returning was yet another indication of a permanent relationship between operator and employees.

The sixth factor, the nature of the activity and its relation to the operator's business, the court noted that to a farm operator harvesting a growing crop is certainly an essential part of the farm operation.

In summary, the court asked the central question whether based on all aspects identified by applying the six factors migrant families were dependent upon the growers for their economic future. If the migrant families are pickle pickers, they need pickles to pick in order to survive economically. The migrants clearly are dependent on the pickle business and the defendants for their continued employment and livelihood. Although the workers could find employment with other growers, it is not necessary to show that workers are unable to find work with any other employer to be classified as an employee rather than an independent contractor.

The Immigration Reform and Control Act

The 1986 Act amending federal law dealing with admission of immigrants to

the United States (8 U.S.C. section 1324 (a) (West Supp. 1992) established specific requirements for employers. Under these requirements, it is unlawful for any person or entity to hire, or recruit for a fee, for employment in the United States an alien knowing that the alien is an unauthorized alien in respect to such employment. In order to determine the identity and eligibility to work in the United States, any person or entity who hires, or recruits for a fee, any person for employment in the United States must comply with Act requirements to verify identity and employment eligibility information about the employee (8 U.S.C. section 1324 (b) (West Supp. 1992). This requires an employer to first examine documents which establish the worker's identity and employment eligibility status. In making this examination, the person reviewing the documents determines if the documents reasonably appear to be genuine on their face. After making the examination the person who employs the worker is required to document the information provided by the worker.

An essential part of this process is determination of the status of the worker as an employee and not an independent contractor. Regulations define the term "employee" as a person who provides services or labor for an employer for wages, but excludes those individuals who meet the definition of "independent contractor" (8 CFR section 274a.1 (f)). An "independent contractor" is an individual or entity who is contracted to do a piece of work according to his or her own means and methods, and subject to control only as to results (8 CFR section 274a.1 (j)). Whether an individual or entity is an independent contractor is based on a case by case determination which disregards the label which the parties apply to the relationship. Factors to be considered include, but are not limited to, whether the individual or entity providing the service: supplies the tools or materials; makes the services available to the general public; works for a number of other clients at the same time; has an opportunity for profit or loss as a result of labor or services provided; invests in the facilities of the work; directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done. Id.

Conclusion

The question of status as an independent contractor or an employee is an important one because of the many federal laws and regulations affected by the determination. Not to be forgotten, however, are other federal and state laws, such as The Employment Retirement Security Act, the National Labor Relations Act, the Federal Unemployment Compensation Act and workers compensation laws that may be applied to determine status for any of several different purposes. As this discussion illustrates, determinations made under one set of rules may not satisfy the elements required under other statutes. In many cases these issues are resolved after the fact of an event that triggers consideration of entitlement to benefits or other advantage. Increasingly, however, employers are considering ways to structure the workplace relationship from the outset to fit an independent contractor classification. Concurrently the federal government is examining ways to improve business compliance with withholding requirements under the Internal Revenue Code. The General Accounting Office's Report, "Approaches for Improving Independent Contractor Compliance", GAO/GGD-92-108 lists several suggestions designed to improve compliance and information reporting of payments to independent contractors. For employers considering reclassifying their employees as independent contractors, the rewards can be substantial, but so can the risks of failing to properly structure the relationship. This is an important issue to those who are interested in improving the Internal Revenue Service's collection efficiency and one which merits careful attention in the future.

Federal Register *in brief*

The following is a selection of matters published in the *Federal Register* during the month of June, 1993.

1. FCA; Accounting and reporting requirements; proposed rule. 58 Fed. Reg. 32071.

2. FCA; Banks and associations; permanent capital components; proposed rule. 58 Fed. Reg. 34004.

3. FCA; Statement on regulatory burden; request for comment; effective date 9/21/93. 58 Fed. Reg. 34003.

4. Ag Marketing Service; Rules of practice governing proceeding on petitions to modify or to be exempted from the Soybean Promotion and Research Order; interim final rule. 58 Fed. Reg. 32436.

5. FCIC; General crop insurance regulations; small grains crop insurance provisions; proposed rule. 58 Fed. Reg. 32458.

6. ASCS; Debt settlement policies and procedures; proposed rule. 58 Fed. Reg. 33029.

7. FmHA; Certified lender program; interim rule. 58 Fed. Reg. 34302.

8. FmHA; Real estate title clearance and loan closing; final rule; technical amendments. 58 Fed. Reg. 43868.

— Linda Grim McCormick, Toney, AL

A New Technological Era for American Agriculture— *Review*

A New Technological Era for American Agriculture, a recent publication of the Office of Technology Assessment of the United States Congress, is now available for purchase from the Government Printing Office. The 450-page softcover book provides a fascinating assessement of how advancing technologies for agriculture, including biotechnology and computer technology, will affect crop and livestock production; agribusiness, labor, and rural communities; farm management; the environment; food safety; and intellectual property rights.

For those interested in structural issues in American agriculture, *A New Technological Era for American Agriculture* offers detailed analyses of how various technological advances may affect farm structure. Consider, for example, procine somatotropin (pST), a swine growth promotant. Although the economic payoffs of adoption of pST are approximately the same regardless of farm size, the publication predicts that pST could nevertheless accelerate the concentration of the swine industry. Accelerated concentration is encouraged by pST adoption because it "increases the total income of large-scale farms more than that of smaller scale farms due to the sheer volume of hogs produced on the large farms. For example, pST increases average annual net cash income $232,000 for the large Indiana farm and only $57,000 for the moderate-size Indiana farm. Thus, the large farm gains an internal source of capital for future growth far in excess of what the smaller farm gains."

A New Technological Era for American Agriculture can be purchased for $23.00 (S/N 052-003-01290-1) by calling 202-783-3238.

— Christopher R. Kelley, Hastings, MN

Disaster benefits/ continued from page 3

yards operating under the statutory trust provisions of the Packers and Stockyards Act. *See ASCS Handbook*, Disaster Assistance, 1-PAD (Rev. 1), Ex. 8 (Amend. 4).

The district court agreed with the Secretary, holding that "attempting to trace the path of all income traveling through a business would be an unreasonable administrative burden in a large-scale assistance program such as this and such a burden was not intended by Congress." *Doane*, slip op. at 24. The court also noted that "plaintiff does not argue that the Chippewa Valley Bean Company was unable to set up a special account for revenues earned on behalf of bean producers that would have met with defendant's approval." *Id.*

— Christopher R. Kelley, Hastings, MN

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Agricultural Law Update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Advance Notice - Fourteenth Annual Meeting

AMERICAN AGRICULTURAL LAW ASSOCIATION

Thursday - Saturday, November 11 -13, 1993

Hotel Nikko, San Francisco, California

The plans for the San Francisco meeting are nearly finalized. We are including a tentative agenda and other information in this issue of the *Update* in order to give you, our members, advance notice and the opportunity to plan before the meeting is publicly announced.

We look forward to returning to San Francisco and the NIKKO Hotel for our annual meeting. Please note that the educational program begins Thursday afternoon and ends Saturday at noon. As with past meetings, I believe you will find this year's topics interesting and the speakers outstanding. We will, of course, request CLE accreditation in all mandatory states and expect credit hour approval similar to previous programs. We are working on a wine country tour for Saturday afternoon. For members tuition remains at $225 (regular)/$90(student).

I hope that many of you are able to attend and I look forward to seeing you there. You may receive more than one mailing of the meeting brochure; please pass along any unneeded copies to an interested associate.

Norman W. Thorston, President-Elect