Focus

October 12, 2020

LAW

INSIDE

Careful classifying workers

Attorney Kathleen Weron cautions employers to be careful when deciding if a worker can be classified as an independent contractor rather than an employee. There are a number of basic labor standards that must be met in order to determine that someone can be moved from the payroll to contractor status.

page F3

Law List

Law Firms
pages F6 & F8

When you require your employees to return to the office, are you liable if any of them contract coronavirus?

John Rogers
The Enterprise

As employers struggle to deal with the "new normal" of trying to maintain their business operations in a time of pandemic, there's at least one legal issue that continues to gnaw at owners and managers and cause no little stress in the board room. Many businesses can't function without their employees — at least some of them — being physically on-site.

Most service and hospitality companies, along with the manufacturing, agriculture, food production and construction industries — and many others — have to have their people on the job to stay in business.

But therein lies the rub.

What if an employee is required to come to work and, while there, contracts COVID-19? Can the employer be held liable? In Utah — and across the nation — employers, employees, lawmakers, attorneys and rights organizations are trying to address this dilemma.

Utah companies have already seen a number of lawsuits stemming from the pandemic.

As far back as May, a woman who contracted the coronavirus sued her employer, arguing the American Fork-based company did not take proper precautions to protect her against COVID-19. Juana Victoria Flores filed the lawsuit against Built Bar, which manufactures and distributes nutritional supplements. Flores said she emailed the Built Bar human resources department in early April, concerned about the number of people on the production line who were sick. She recommended a professional company be brought in to clean up or fumigate the building. Flores developed a cough the next day and was diagnosed with the coronavirus less than a week later, her lawsuit said.

Flores said she never received a response to her email. Her lawsuit claims Built Bar "knowingly, intentionally and recklessly" exposed its employees to the coronavirus and allegedly refused to provide employees with personal protective equipment, did not sanitize its facilities and threatened to terminate anyone who raised safety concerns. Built Bar dismissed the merits of the complaint and said that the safety and health of its employees was the company's top priority.

Flores' suit, which seeks compensation for a host of grievances, including legal fees, past and future medical expenses, depression, diminished earning capacity and lost wages, continues to work its way through the court system.

Most states and cities across the U.S are facing similar filings. For instance, McDonald's workers in Chicago have filed a class-action suit against the fast-food chain, accusing it of failing to adopt government safety guidance on COVID-19 and endangering employees and their families.

Utah, along with most other states,

see LIABILITY page F9

Misclassifying employees as independent contractors could be costly for your business

Employee classification is the practice of labeling workers as either employees or independent contractors. A worker classified as an independent contractor is not covered by basic labor standards, such as minimum wage, overtime pay, workers' compensation and unemployment insurance.

As a response to Utah's increasing unemployment compensation claims as a result of COVID-19, the Utah Department of Workforce Services (DWS) has begun auditing more of Utah's employers and aggressively enforcing correct classification of workers. For example, where an employer has misclassified an employee as an independent contractor and that individual later files a claim for unemployment benefits with DWS, the state agency may audit the employer and identify the worker as a misclassified independent contractor. In that case, DWS will order the employer to pay back unemployment insurance taxes or other payroll taxes for the misclassified employee(s). In addition, as a result of a September 2011 Memorandum of Understanding with the U.S. Department of Labor (DOL), information about an employer's misclassification may be shared between DWS, the DOL and the Internal Revenue Service to ensure that employees are not misclassified as independent contractors. In short, misclassification of an employee as an independent contractor is risky business and can result in budget-crushing back payments, fines and penalties.

Utah employers should make sure classifications comply with the federal Fair Labor Standards Act (FLSA). At the state level, there is no single established definition of an independent contractor. Different tests are applied depending on the circumstances of a particular case, including whether the classification raises issues under workers' compensation, tax liability or unemployment insurance.

Because of the recent pursuit by DWS of misclassified employees based on independent contractors applying for unemployment benefits, this article focuses on the definition of employee versus independent contractor in the context of Utah's Employment Security Act, which outlines a Utah employer's obligations to pay unemployment insurance, and is enforced by Utah's DWS.

Under the Utah Employment Security Act, two primary factors emerge as essential to the classification of an independent contractor. First, is the individual "independently established"? Second, is the individual "free from the employer's control and direction"? DWS will analyze the following factors to determine whether a worker is properly classified as employee or independent contractor and employers should, too:

Independently Established. An individual will be considered independently established if he or she has already created an independently established trade, occupation, profession or business that exists apart from his/her relationship with a particular employer and does not depend on a relationship with any one employer for its continued existence. Under this first factor, having more than one client for whom the individual performs services will weigh in favor of the individual being classified as an independent contractor. The following additional factors are also considered:

• Separate Place of Business. The worker has his/her own place of business separate from the employer. This would include a separate facility, company telephone numbers and a separate Internet address. That a worker merely works remotely does not weigh heavily in support of the independent contractor status, especially now that so many employees are remote due to COVID-19.

• Tools and Equipment. The worker has a substantial investment in the tools, equipment or facilities customarily required to perform services. However, "tools of the trade" used by certain trades or crafts do not necessarily demonstrate independence. An individual who merely uses employer-provided tools, including computer programs and software, is probably not sufficient to establish independent contractor status.

• Other Clients. The worker regularly performs services of the same nature for other customers and is *not* required to work exclusively for one employer. Employers should be careful not to require independent contractors to agree to a non-compete or any agreement that prohibits the worker from engaging in any activities that conflict with or compete with the company as such an agreement would weigh heavily in favor of the worker being classified as an employee.

• Profit or Loss. The worker is in a position to realize a profit or loss from expenses and debts incurred through an independently established business activity. A worker with his/her own independently established business will track the business' profits as well as its losses and likely maintain separate policies (i.e., workers' compensation, liability insurance, etc.).

• Advertising. The worker advertises services in telephone directories, newspapers, magazines, the Internet or by other methods clearly demonstrating an independent effort to generate business. The more the worker relies upon his/her own advertising and business development efforts, the less likely he/she is dependent on the employer and this demonstrates worker independence.

• Licenses. The worker has obtained any required and customary business, trade or professional licenses. This would include business registrations with the Utah Department of Commerce or independently funded licensing requirements and liability insurance.

• Business Records and Tax Forms. The worker maintains records or documents that validate expenses, business asset valuation or income earned so he/she may file self-employment and other business tax forms with the IRS and other agencies. This factor requires more than just passively receiving a tax Form 1099 and filing the same with the IRS. DWS has routinely found that merely filing a Form 1099, without evidence that the worker maintained records to document business expenses or asset valuation for business purposes, is not persuasive that the worker is independent.

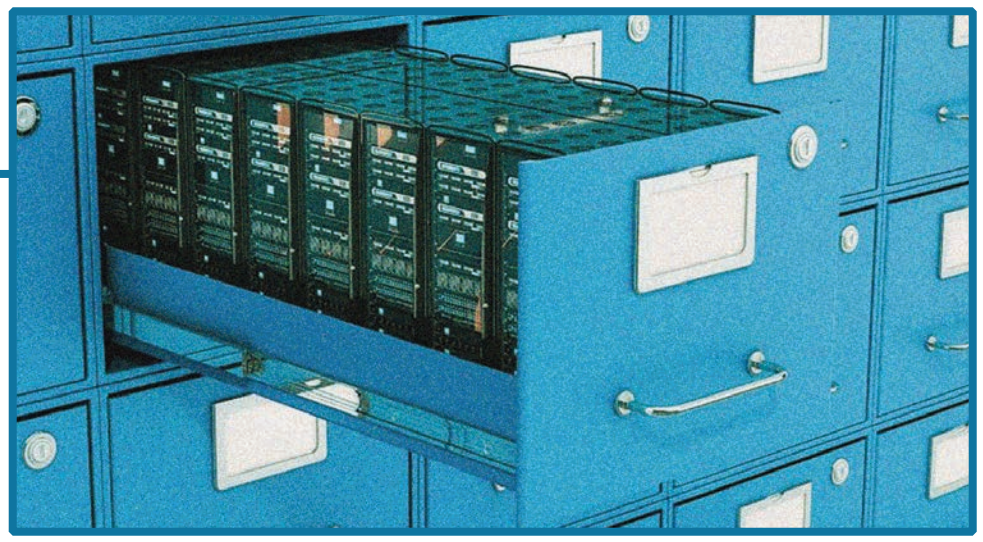
• **Control and Direction.** If an employer satisfies this first test, there will be a rebuttable presumption that the employer did not have the right of or exercise of direction or control over the service. The following factors are used as aids in determining whether an employer has the right of or exercises control and direction over the service of a worker:

1. Instructions. A worker required to comply with a superior's instructions about how the service is to be performed is ordinarily an employee. This factor is present if the employer for whom the service is performed has the right to require compliance with the instructions (e.g.,

see CLASSIFICATION page F8

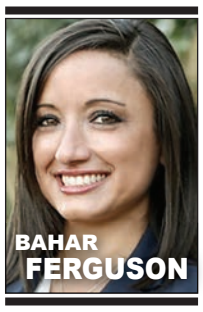
CONTENT MANAGEMENT:

There's a modern alternative to the law office file room



Law firms are like many other businesses when it comes to information technology — at least in some ways.

Any type of business or organization must have some basic document management in place to ensure files don't get lost or misplaced and basic cybersecurity to protect against hacks, data theft and other threats. However, law firms have some additional regulations as well — they must keep up with federal, state, local and international laws and compliance regulations that are specific to the legal market.



Most workers in a law firm — from partners to administrative assistants — work with classified data in some form or another and many workers — particularly now — use their computers away from the office. These computers and files contain a lot of sensitive legal information, like client data and personally identifiable information, and all of it is subject to numerous U.S. and international regulations. The European Union's General Data Protection Regulation (GDPR), which went into effect in May 2018, may be the most well-known, but many U.S. states have followed suit — notably California, with the California Consumer Privacy Act (CCPA).

What does all this have to do with technology? The way files and documents are managed is directly related to document security and a firm's compliance with these regulations. It is important, therefore, for a law firm to have very specific technology in place. In other words, law firms must become high-tech in order to maintain relevancy and efficiency. These requirements include systems that allow for secure collaboration, are backed up and protected against hackers and viruses, and keep client data secure.

Collaboration and digitalization

It's nothing new for law firms to have employees in numerous locations around a city, in multiple states or even in various countries around the world. These employees still need to work together on cases and projects, which requires the use of a robust enterprise content management (ECM) system. Often, however, law firms are mired in paper and outdated processes.

The file room and offices of any law firm can contain hundreds of cabinets and hundreds of thousands of paper files. Not only do these take up space, it is next to impossible for a worker who is not in the office to find a necessary document — it is probably difficult even for a worker who *is in* the office. This is where digitalization becomes important, and one of the best ways to achieve digitalization is ECM.

What is ECM? According to IT glossary website Gartner, "Enterprise content management is used to create, store, distribute, discover, archive and manage unstructured content (such as scanned documents, email, reports, medical images and office documents) and ultimately analyze usage to enable organizations to deliver relevant content to users where and when they need it." Yes, that means that even handwritten documents, once scanned and optimized, can be searched and the data in them indexed, making them discoverable by anyone accessing the system.

By having an ECM system in place, law firm workers in any geographic location can have access to a central repository of files and data and can likewise store their data in that repository. Access can be restricted on a user or group basis to protect sensitive information and remain in compliance. This also prevents the common issue of workers using BYOS (bring your own software) — where different employees are using different cloud storage options, like Dropbox or Box, that are not accessible to all, don't allow for true collaboration and may not meet privacy standards.

Of course, having a central repository for documents that are born digital is one thing, but what about those thousands of paper documents? Is someone going to manually scan all of those documents into the system? Well, sort of. Increasingly, companies are going through the process of digitization — turning paper documents into digital files — and this can be done by using a scanning service for existing documents. These services use incredibly high-speed and advanced devices. We're not talking about your old flatbed scanner here. These scanners are available to in-house scanning centers as well as larger firms that can afford them.

For new documents — the ones not already sitting in the file cabinets, but the ones that come into the firm daily — a digital intake center can be set up so documents are scanned upon receipt. Think of it as a digital mailroom. Paper document retention is governed by regulations and only those hard copies legally required to be kept are not tossed in the shred pile.

Intelligent process automation is another piece of technology designed to streamline processes, using robotic process automation (RPA) and artificial intelligence (AI) to carry out activities traditionally done by humans, e.g., sorting and storing legal documents according to a specified workflow. These types of technologies allow law firms to work more collaboratively from any location, cut down on physical space needed to house offices, and enable faster and more efficient document processing, freeing up employees for more important jobs.

Staying protected

But, you may ask, isn't it dangerous to have all that classified information stored somewhere intangible, like the cloud? There is so much news about hacks and data breaches, aren't we more susceptible? And what if there is a natural disaster or what if the computers just break? What happens to all the data?

Well, of course, it is essential that law firms have a solid backup and disaster recovery (BDR) program in place. This ensures that data is housed in more than one place and is secured by standards that meet all compliance and privacy regulations applicable to law firms.

Having data backups is absolutely essential — and most businesses understand that. If you're having a hard time adjusting to the idea of digital document storage, think about the safety of the paper documents that were sitting in the office. They may have been locked in file cabinets in a building with a security system and guards, but did that really ensure they were completely safe? Only if there were multiple copies of those documents in different geographic locations would they be completely secure from theft or damage — and that would be a lot of space to use for paper document storage.

The cloud, which enables data to be housed in centralized repositories, also enables that data to be backed up to multiple locations. Data centers dedicated to this type of service allow automated, encrypted backups of data to one or more geographical locations. This ensures that in the event of a data breach or hack, normal operations can be restored and business as usual can continue. It also protects against natural disaster — damage done to computer equipment by floods, fires or other forces of nature. And it also protects against human error. When files are cloud-based and centralized, the loss of a laptop computer is less damaging.

Of course, files are still accessible via those individual employee laptops, tablets and other devices, so it is important that the IT staff of a law firm have policies in place for use of personal devices, encryption of computer hard drives and regular virus and malware scans of devices as well as the entire network.

There is no type of business in the world these days that is immune from technical problems, but there are some that are more vulnerable than others. For law firms, with so much classified data to deal with, staying up to date with technology is vital. By utilizing the best technical offerings available, putting best practices into place and staying aware of employee activity, law firms can not only stay secure and in compliance, they can become more productive; increase collaboration and save money in fines; physical office space and employee time.

Bahar Ferguson is the president of Wasatch I.T., a Utah provider of outsourced IT services for small and medium-sized businesses.

Exploring investment bank engagement agreements in sell-side M&A transactions

When the owners of a business decide to sell their company, they will generally engage an investment bank (iBank) to assist with the transaction. An experienced iBank can add significant value to a sellside M&A transaction. However, it's important that the iBank's interests and those of the company be aligned. That alignment of interests is achieved through a properly structured iBank engagement agreement.

This article is written from the perspective of a seller in a middle market sell-side M&A transaction. Certain issues are identified below that sellers should carefully review and consider before entering into an engagement agreement with an iBank.

Scope of Services. The agreement should set forth a detailed list of the primary services that will be provided. Doing so will avoid disputes regarding the services to be provided.

Exclusivity. Engagement agreements will provide that the iBank will be the seller's exclusive financial advisor for the transaction. Exclusivity is necessary in order to give the iBank a realistic amount of time to market and sell the company. The iBank will ask for as long of an exclusivity period as it can get, whereas the seller will want as short an exclusive period as possible. A six- to 12-month exclusivity period is fairly standard.

Definition of "Transaction" and CarveOuts. Typically, the first draft of an engagement agreement will provide for an all-encompassing definition of what constitutes a "transaction," the closing of which will entitle the iBank to a success fee (see "iBank Compensation," below). "Carveouts" to that definition should be considered. If the seller has an established relationship with any prospective buyers, the agreement should be modified to exclude those prospective buyers and/or reduce the iBank's success fee accordingly.

Transaction Value. Success fees are generally calculated on the basis of "transaction value." The iBank's initial engagement agreement generally includes a comprehensive list of how the iBank proposes to determine the transaction value. Failing to carefully scrutinize that definition can be a very costly mistake. As a general rule, the iBank should not be compensated for anything that does not result in value creation for the seller.

iBank Compensation. iBank compensation is generally comprised of two components: a retainer and a success fee.

• Retainer. A one-time, nonrefundable retainer is generally paid at the time the engagement agreement is executed, although sometimes the retainer will be paid on a periodic basis (usually monthly) for a predesignated period of time. The purpose for the retainer is to allow the iBank to recover some of its costs and expenses if the transaction does not close and ensure the seller is committed to selling the company. Retainers generally range between $25,000 and $75,000 and should always be capped and be credited against the success fee.

• *Success Fee*. The success fee will almost always be calculated based on a percentage of the transaction value. Success fees are generally either, a. A flat percentage of the transaction value or, B. a progressive upward scaled percentage. Success fees typically range from 3 percent to 8 percent of transaction value. Most iBanks will also require a minimum success fee, often in the range of $200,000 to $600,000. The success fee is payable in cash out of the sale proceeds upon the closing of the transaction.

Expense Reimbursement. Engagement agreements will require the company to reimburse the iBank for out-of-pocket costs and expenses incurred in connection with the engagement, such as travel and lodging. While expense reimbursement is customary, sellers should ensure that the agreement establishes some ground rules. The company should require that all reimbursable expenses be subject to a reasonableness standard and be limited to out-of-pocket payments made to third parties. Furthermore, reimbursable expenses should be capped at a predetermined dollar amount and be required to be preapproved if any expense will exceed a specified dollar amount. Reimbursable expenses are often in the $20,000 to $40,000 range.

Escrows and Earnouts. It's common for one or more escrow accounts to be established with a third-party escrow agent in order to provide for such things as indemnification claims and working capital adjustments. Money from the sale proceeds will be held in such escrow until the contingency has been satisfied. In addition, sell-side M&A transactions sometimes involve an "earnout" or contingent payments to the seller, depending on the post-closing performance or operating results of the target company. Many iBanks will seek to have the full amount of such escrows and the maximum possible contingent earnout amount included in the definition of the transaction value. However, including those amounts in the transaction value is not appropriate and should be resisted by sellers. Rather, the engagement agreement should

see M&A page F9

LAW FIRMS

Ranked by Number of Utah Attorneys

THE List

	Company Name Address	Phone Web	No. of Utah Attorneys	No. National Attorneys	No. of Utah Partners	No. of Utah Paralegals	No. Utah F/T Employees	No. National Locations	Areas of Specialty	Year Est.	Managing Partner
1	**Parsons Behle & Latimer** 201 S. Main St., Ste. 1800 SLC, UT 84111	801-532-1234 parsonsbehle.com	117	41	82	7	188	6	Full-service corporate law firm	1882	Hal J. Pos
2	**Ray Quinney & Nebeker PC** 36 S. State St., Ste. 1400 SLC, UT 84111	801-532-1500 rqn.com	101	102	68	7	161	1	Main practice areas include: banking & finance; bankruptcy & creditors' rights; corporate & business; employment law; environmental law; intellectual property; litigation; real estate; tax, trust & estate planning; white collar & corporate compliance	1940	Arthur B. Berger
3	**Durham Jones & Pinegar** 111 S. Main St., Ste. 2400 SLC, UT 84111	801-415-3000 djplaw.com	98	98	61	13	128	4	As a business-focused law firm, we offer a spectrum of legal services in a number of specialized fields. These include complex business & finance law, banking, commercial litigation, intellectual property, bankruptcy, real estate, tax, estate planning, employment, family law, immigration and more.	1991	N. Todd Leishman
4	**Holland & Hart LLP** 222 S. Main St., Ste. 2200 SLC, UT 84111	801-799-5800 hollandandhart.com	76	448	46	6	146	13	Commercial litigation, corporate, environmental and natural resources, intellectual property, labor and employment, real estate finance and development, tax and estate planning	1947	James Barnett
5	**Parr Brown Gee & Loveless PC** 101 S. 200 E., Ste. 700 SLC, UT 84111	801-532-7840 parrbrown.com	74	0	58	9	107	1	Business & finance, commercial litigation, bankruptcy, workouts & creditors' rights, construction law services, employment law, international services, natural resources law, real estate law, tax, technology	1975	Bentley J. Tolk
6	**Strong & Hanni Law Firm** 102 S. 200 E., Ste. 800 SLC, UT 84111	801-532-7080 strongandhanni.com	71	71	56	20	136	2	Business and litigation	1888	Braden P. Jackson
7	**Fabian VanCott PC** 215 S. State St., Ste. 1200 SLC, UT 84111	801-531-8900 fabianvancott.com	67	73	32	4	86	2	Corporate, bankruptcy, education, labor, energy/utilities, environmental, ERISA, government, venture capital, white-collar defense, intellectual property, litigation, product liability, real estate, taxation, estate planning	1874	Kyle C. Jones
8	**Dorsey & Whitney LLP** 111 S. Main St., 21st Floor SLC, UT 84111	801-933-7360 dorsey.com	66	562	29	8	100	19	Corporate, securities, M&A, private equity, bankruptcy, financial restructuring, litigation, natural resources, environment, intellectual property, international, white-collar defense	1912	Nolan S. Taylor
9	**Jones Waldo** 170 S. Main St., Ste. 1500 SLC, UT 84101	801-521-3200 joneswaldo.com	65	65	32	8	112	4	Real estate, litigation, corporate and securities	1875	Keven Rowe
10	**Snell & Wilmer,** Gateway Tower West 15 W. South Temple, Ste. 1200 SLC, UT 84101	801-257-1900 swlaw.com	60	450	24	5	105	15	Bankruptcy; commercial finance; commercial litigation; corporate and securities; environmental; oil, gas and mining; finance; intellectual property; labor and employment; mergers and acquisitions; natural resources; product liability; real estate; tax and estate planning	1938	Wade R. Budge Brian D. Cunningham
11	**Stoel Rives LLP** 201 S. Main St., Ste. 1100 SLC, UT 84111	801-328-3131 stoel.com	59	363	33	10	65	10	Corporate, finance, business litigation, environmental and natural resources, labor and employment, real estate, technology and intellectual property law.	1907	D. Matthew Moscon
12	**Snow Christensen & Martineau** 10 Exchange Place, 11th Floor SLC, UT 84111	801-521-9000 scmlaw.com	55	55	34	14	110	2	Corporate and business planning, commercial disputes, commercial RE, construction, employment, estate planning, family law, government defense, healthcare, insurance, professional liability, taxation, transportation, white-collar defense	1886	Rodney R. Parker President
13	**Workman Nydegger PC** 60 E. South Temple, Ste. 1000 SLC, UT 84111	801-533-9800 wnlaw.com	46	46	32	8	86	1	Patents, trademarks, copyright, litigation, e-commerce, trade secrets, licensing and transactional work, post-grant proceedings, IP counseling, international IP	1984	Thomas R. Vuksinick

THE Enterprise
UTAH'S BUSINESS JOURNAL

*Did not disclose. Please note that some firms chose not to respond, or failed to respond in time to our inquiries.

CONTINUED page F8

LAW FIRMS

Ranked by Number of Utah Attorneys

THE List

	Company Name Address	Phone Web	No. of Utah Attorneys	No. National Attorneys	No. of Utah Partners	No. of Utah Paralegals	No. Utah F/T Employees	No. National Locations	Areas of Specialty	Year Est.	Managing Partner
14	**Clyde Snow & Sessions** 201 S. Main St., Ste. 1300 SLC, UT 84111	801-322-2516 clydesnow.com	35	35	22	2	47	2	Bankruptcy, business and finance, estate planning and tax, family law, labor and employment, litigation, natural resources and water law, real property, white collar and regulatory	1951	Edwin C. Barnes President
15	**Richards Brandt Miller Nelson** 111 E. Broadway, Suite 400 Salt Lake City, UT 84111	801-531-2000 rbmn.com	34	34	24	8	57	1	Litigation, business, construction, family, estate planning and immigration	1978	Mark Sumsion
16	**Maschoff Brennan** 1389 Center Drive, No. 300 Park City, UT 84098	435-252-1360 mabr.com	30	47	22	4	82	5	Intellectual property & complex litigation	2011	Kirk R. Harris
17	**Thorpe North & Western LLP** 8180 S. 700 E., Ste. 350 Sandy, UT 84070	801-566-6633 tnw.com	29	1	21	3	37	2	Intellectual property, patents, trademarks and copyright, including prosecution and litigation	1979	*
18	**Ballard Spahr LLP** One Utah Center, Ste. 800 201 S. Main St., SLC, UT 84111	801-531-3000 ballardspahr.com	26	570	10	5	47	15	Real estate, complex litigation, employment, corporate, emerging growth, government relations, consumer financial services	1885	Mark Gaylord
19	**Cohne Kinghorn PC** 111 E. Broadway, 11th Floor SLC, UT 84111	801-363-4300 cohnekinghorn.com	24	18	18	1	10	1	Appellate practice, arbitration & mediation, bankruptcy, business formation & planning, commercial and civil litigation, construction law, family law, healthcare law, insurance, medical malpractice defense, mergers and acquisitions, real estate and real property, transactions & securities law, trial practice as well as wills, trusts and estate planning	1975	John Bradley
20	**TraskBritt PC** 230 S. 500 E., Ste. 300 SLC, UT 84102	801-532-1922 traskbritt.com	21	21	15	9	48	1	Intellectual property	1973	J. Jeffrey Gunn
21	**Smith Hartvigsen PLLC** 257 E. 200 S., Ste. 500 SLC, UT 84111	801-413-1600 smithhartvigsen.com	14	14	6	2	19	1	Water, enviormental, litigation, redevelopment, land use	2002	*
22	**Babcock Scott & Babcock** 370 E. South Temple, Ste. 400 SLC, UT 84111	801-531-7000 babcockscott.com	9	0	7	1	1	1	Construction law	2000	Robert Babcock Kent Scott

THE Enterprise UTAH'S BUSINESS JOURNAL

*Did not disclose. Please note that some firms chose not to respond, or failed to respond in time to our inquiries.

CLASSIFICATION

from page F3

the assignment of daily or weekly tasks to be completed, daily accounts to be serviced, etc.).

2. Training. Training a worker by requiring or expecting an experienced person to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings or by using other methods, indicates that the employer for whom the service is performed expects the service to be performed in a particular method or manner, thus exercising control and direction.

3. Pace or Sequence. A requirement by the employer that the service must be provided at a pace or ordered sequence of duties indicates control or direction. The coordinating and scheduling of services of more than one worker does not indicate control and direction.

4. Work on Employer's Premises. A requirement that the service be performed on the employer's premises generally indicates that the employer for whom the service is performed has retained a right to supervise and oversee the manner in which the service is performed, especially if the service could be performed elsewhere. This factor may not apply if the service cannot be performed elsewhere. Also, as a result of COVID-19, a worker working remotely does not, by itself, establish independence.

5. Personal Service. A requirement that the service must be performed personally and may not be assigned to others indicates the right to control or direct the manner in which the work is performed.

6. Continuous Relationship. A continuous service relationship between the worker and employer indicates an employee-employer relationship exists. A continuous relationship may exist where work is performed regularly or at frequently recurring although irregular intervals. A continuous relationship does not exist where the worker is contracted to complete specifically identified projects, even though the service relationship may extend over a significant period of time.

7. Set Hours of Work. The establishment of set hours or a specific number of hours of work by the employer indicates control.

8. Method of Payment. Payment by the hour, week or month points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying progress billings as part of a fixed price agreed upon as the cost of a job. Control may also exist when the employer determines the method of payment. To establish independence, an independent contractor should provide a written bid or quote for each job and invoice the company separately on his/her own invoicing system.

It has become increasingly important for Utah businesses to properly classify workers. Misclassification of employees as independent contractors is a serious issue and can have severe financial consequences. It is well worth the effort required to ensure workers are properly classified as employees or as independent contractors.

Kathleen D. Weron is an employment law attorney with Manning Curtis Bradshaw & Bednar in Salt Lake City where her practice focuses on management counseling, including advising employers on proper employee classification under federal and state statutes and employment litigation. She graduated from the University of Utah's S.J. Quinney College of Law.

LIABILITY

from page F1

has issued guidance — mostly in the form of statute — for companies as they resume operations and bring workers back into the workplace. The federal Occupational Safety and Health (OSHA) Act requires employers to keep the workplace safe and free of recognized hazards. Most states have similar laws that sometimes give employees greater protection.

The federal government has also published guidelines for reopening businesses in the wake of COVID-19 on its Opening Up America Again website. Health and safety measures — including the familiar masking, social distancing and hand washing — have been added to strict sanitation guidelines for both business facilities and public-facing areas.

Utah offered employers liability protection in May in the form a new state law that gives the state's businesses protection from litigation stemming from an individual contracting coronavirus on their property as the state first began to allow some of its businesses to reopen. Under the law, business owners are "immune from civil liability for damages or an injury resulting from exposure of an individual to COVID-19" that happens at their premises. The legislation does not protect businesses, however, if they display "willful misconduct, reckless infliction of harm or intentional infliction of harm."

While the bill passed both of the state's legislative chambers, it wasn't without its critics and faces court challenges from a variety of fronts.

"It sends precisely the wrong message to businesses and to landlords and to people out there who should be concerned that they do everything they can that's reasonable to protect their customers and protect their employees," House Minority Leader Brian King - D, Salt Lake City, told *The Salt Lake Tribune*.

Utah wasn't the first state to grant this kind of protection to certain establishments. Also in May, ABC News reported that at least 15 states, either through executive order or legislation, have given legal protection to nursing homes and long-term care facilities. Laws similar to Utah's have passed or are moving through the legislative process in many states.

At a national level, passage of liability protection for employers has fallen primarily along party lines. It has become a football punted back and forth during the often-rancorous negotiations over the various coronavirus relief packages dating back to the first bill in May. It is one of the points of contention holding up the currently debated stimulus bill.

In August, Utah Attorney General Sean Reyes joined other states' attorneys general in renewing their May call for federal immunity legislation. Reyes is leading a coalition with Georgia Attorney General Christopher Carr and 20 more state attorneys general who co-signed a second letter to Congress urging the adoption of the protections for employers as the nation goes back to work. Reyes and his colleagues said their efforts are to "help mitigate the threat of frivolous COVID-related litigation for much-needed goods and services while still ensuring victims have necessary legal redress for legitimate claims."

"In the midst of this devastating crisis, the extension of appropriate civil liability protections to small and large businesses, frontline healthcare facilities, schools, colleges, universities, philanthropic and religious nonprofits, local government and other critical providers is crucial," said Reyes. "Utah has already put legal safeguards in place. But our economy needs these protections at both the state and federal level to provide stability for those trying to provide much-needed services while dealing with evolving science, differing standards and changing government guidelines or mandates." A number of employer immunity bills have been introduced in Congress only to die in committee.

Republican Representative Mike Turner of Ohio, when introducing one such proposed law that would have given businesses that comply with social distancing and other safety guidelines immunity from civil suits, said, "Many businesses are concerned about reopening due to the risk associated with being held liable if one of their employees contracts coronavirus after coming back to work. This bill is proactive and seeks to protect complying businesses and employees as we begin to restart the economy."

Manufacturers of certain protective equipment were granted this kind of legal immunity through one of Congress' earlier coronavirus stimulus bills, but Democratic leadership has pushed back on the idea of expanding the protection to businesses, saying that it could hurt workers.

"At the time of this coronavirus challenge, especially now, we have every reason to protect our workers and our patients in all of this," Speaker Nancy Pelosi (D-California) has said. "So we would not be inclined to be supporting any immunity from liability."

Some employers in Utah and other places have attempted to be proactive in fending off lawsuits by asking those returning to work to sign COVID-19 liability waivers. Most legal experts agree that, depending on individual state laws, such agreements are questionable at best and likely unenforceable due to the ambiguities in defining the responsibility of an employer to maintain a safe working environment.

To complicate matters, a number of states, including Texas and Iowa, have said that an employee's refusal to return to work will be viewed as a "voluntary quit," making them ineligible for unemployment. And under the CARES Act, fear of contracting COVID-19 is not one of the exceptions that prevent employees from losing their unemployment benefits.

In unprecedented times like these, there is plenty for business owners and operators to worry about. And the fear of being sued by an employee who gets sick at work has to be keeping many awake at night.

M&A

from page F5

provide that the iBank will be paid its portion of such monies only if and when paid to the seller.

Term, Termination. Generally, the initial term (the term of most engagement agreements will be six to 12 months. The term should be long enough for the iBank to properly market and sell the company, but not so long as to provide a disincentive for the iBank from working diligently and closing the transaction as soon as reasonably possible. The initial draft of most engagement agreements will provide that the term will be for a specific period of time and will automatically renew for additional successive one-month periods unless either party terminates. However, sellers should consider negotiating for the engagement agreement to automatically terminate at the expiration of the term unless the seller elects to extend. Furthermore, the seller should have the right to terminate the engagement agreement at any time without cause upon 30 days' prior written notice. The engagement agreement should also entitle the seller to terminate the relationship immediately for cause, including a material breach by the iBank or its gross negligence, willful misconduct or bad faith.

Tail Period. iBank engagement agreements will always include a "tail" or "tail period." The tail period is a period of time, after the expiration or termination of the engagement agreement, during which the iBank will be entitled to be paid its success fee if a transaction is consummated. Tail periods are heavily negotiated. Sellers should try to limit the tail to as short a period as possible, whereas iBank's will always advocate for as long a period as they can get. Tail periods generally range between six and 24 months, with 12 to 18 months being fairly common.

Indemnification. iBanks will always insist on being indemnified for any liability they incur as a result of their involvement in an M&A transaction. Indemnification is customary and appropriate because any claims that may arise likely will be attributable to information provided by the seller, which the iBank relied upon in marketing and selling the company. These provisions will require the company to indemnify the iBank, provided that the claim does not arise from the iBank's fraud, gross negligence or willful misconduct. iBanks and their counsel will generally not agree to any substantive changes to their form indemnification agreement.

Lead Investment Banker. iBanks are commonly hired based on the industry experience, expertise and reputation of one or more key members of the iBank's team. If any individual investment banker will be essential to a successful transaction and is expected to lead the deal, the engagement agreement should so provide. The agreement should also grant the seller the ability to terminate the engagement if the key investment banker leaves the iBank or for any reason they are not actively involved in the transaction.

Confidentiality. The engagement agreement should contain a comprehensive confidentiality provision. Also, if the seller discloses confidential information to any iBank before an engagement agreement is executed (which is often done during the process of interviewing and vetting iBanks), the seller should enter into a separate, stand-alone confidentiality agreement with each such iBank *before* disclosing any confidential information. The confidentiality agreement should prohibit the iBank from using or disclosing any of the seller's confidential information and should remain in place throughout the term and tail period and for at least one to two years thereafter.

Thomas R. Taylor is a corporate and M&A lawyer and a shareholder in the Salt Lake City office of the law firm of Durham, Jones & Pinegar P.C. He maintains an AV/Preeminent rating with MartindaleHubbell, which is the highest rating awarded to attorneys for professional competence and ethics.

Utah's continued momentum in residential and commercial real estate

When you consider the rapidly expanding residential and commercial real estate markets in Salt Lake City and its surrounding suburbs, it brings to mind the highly anticipated 26-minute commute from Cleveland to Chicago via the high-speed hyperloop line that is currently in development. It is a thrill to be along for the ride. Despite six months of uncertainty in the midst of a public health crisis and pandemic, the Salt Lake City real estate market continues to show significant strides and increased demand in many sectors, especially in the multi-family residential market.

So, what is driving the exponential growth in the local real estate market? This article outlines several factors that appear to be contributing to this growth.

Business-Friendly. Utah is friendly to business and real estate investment alike. I can point to several policies to get an indication of what makes Utah business-friendly:

1. Comparatively lower real estate property tax rates (i.e., Salt Lake City's rate is 0.012357 as compared to Denver's 2019 tax rate of 0.072116).

2. No transfer or conveyance tax on the transfer of title of real property (as compared to Nevada's rate of $1.30 on each $500 of value, or fraction thereof, imposed on each deed by which any lands are granted, assigned, transferred, or otherwise conveyed in excess of $100.

3. Comparatively lower general recording fees.

4. Salt Lake City's Redevelopment Agency (RDA) and other governmental incentives to develop multi-family and affordable housing, and government's willingness to partner with for-and non-profit housing developers.

5. Zoning and land-use regulations that more and more depart from the separation of "uses" characterized by Euclidian zoning (which designates closely related and compatible uses for each zoning district) to a more progressive mixed-use, dynamic, new urbanism that optimizes residential and commercial utilization while providing for green space.

Growing Population/ In-Migration. Propelled by rapid growth in Silicon Slopes and other local centers of innovation, businesses are coming to Utah in droves. I recall attending a title insurance convention in 2008 in Columbus, Ohio, and debating with colleagues the projected real estate preferences of the millennial generation. It is a debate still raging: Where will millennials (born between 1981 and 1996, or 24- to 39-years-old) decide to settle with their families? If recent trends are any indication, millennials may prefer suburban areas. Since March 2020, the residential real estate market has seen a 13 percent increase in home searches in the suburbs, and for every one millennial in the city, there are four moving to the suburbs.

Kenneth T. Holman, president of Overland Group Development in Draper, said "We have seen a shift since COVID-19 has hit, that especially the millennials desire to move to the suburbs to find a home to raise their family."

The millennial population represents approximately 23 percent of Utah's population. Based on supply and demand alone, it is not surprising that single-family homes, multi-family and clusters are in such short supply. There is also some evidence to suggest that individuals and businesses are leaving larger urban centers and moving to less densely populated communities, which are also more affordable. Salt Lake City will likely see additional in-migration attributable to this trend.

Interest Rates. Historically low interest rates for the popular 30-year mortgage also are helping to fuel growth in the local real estate market. As of Aug. 31, the 30-year fixed rate was 2.91 percent, compared to 3.58 percent for the same time last year. The average 15-year fixed rate is at 2.46 percent, compared to 3.06 percent last year.

Online Land Record Offices. The Salt Lake City Recorder's Office (the governmental entity that stores and retrieves Salt Lake County's land records, (i.e., deeds, easements, mortgages/deeds of trust) provides online/e-recording of land records and has maintained uninterrupted service throughout the COVID-19 pandemic. Keeping the pipeline of land deals moving and recorder office staffed and open has been very important to our success since March 2020.

Increasingly Utilizing Retirement Accounts to Invest in Real Estate. More and more individuals (and professionals providing guidance) are considering self-directed individual retirement accounts (IRAs) to invest in real estate. Simply stated, a self-directed IRA is an IRA (Roth, traditional, SEP, inherited IRA, SIMPLE) where a custodian or administrator of the account allows the IRA to invest into an allowable asset class (i.e., real estate, investments into start-ups that tackle societal issues, peer-to-peer lending, etc.) not allowed within traditional retirement plans. A self-directed IRA can invest in real estate and receive the same tax-deferred (traditional) or tax-free (Roth) treatment. Moreover, capital gains from the sale of real estate within a self-directed IRA are exempt from capital gains tax. Keep in mind, however, there are very specific rules that govern the self-directed IRA, so caution should be taken to carefully understand how to utilize this tool. In addition, millennials increasingly want to direct where their money is invested; "impact investing" has become the coined phrase. For example, an individual may direct their retirement asset to invest in acquiring acreage for an urban farm and restaurant or a ski and skate park, which offers teens a safe and healthy space. A number of lending institutions in Utah offer custodian and management services.

Subleasing. Utah investors see opportunity in using real estate subleasing techniques to keep commercial space stabilized. COVID-19 has driven office workers home and businesses have seen less need for office space. Another common subleasing scenario arises when a business expands at such a fast pace that it outgrows existing lease space. While landlords may not be willing to terminate the lease early, they are willing to permit subleasing. Subleasing enables a primary tenant to capitalize on excess space. While subleasing is common and becoming increasingly popular, drafting sublease agreements can be tricky, especially as subleases tend to involve greater legal risk than a direct lease between a landlord and tenant.

Innovation and Optimism. As a newcomer to the Utah market (having lived in Salt Lake City now for three years), I see striking characteristics among Utahns that set the people here apart from most others: Utahns have an innate desire for success, an ingrained attitude of optimism and an unabashed passion and open-mindedness to be innovative and challenged, and to work collaboratively in partnership to continually improve the quality of life in our region. These characteristics are unique and exciting and should not be ignored as important drivers to the success of the market.

Kathryn J. Carlisle-Kesling is an attorney at Holland & Hart LLP in Salt Lake City and advises developers, builders, lenders and title companies with real estate and construction transactions, projects and workouts.