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### New IRS Program Offers Tax Relief from Misclassification of Workers

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Whether a worker is performing services as an employee or an independent contractor generally is dependent on whether the service recipient has the right to control and direct the services provided by the worker.

Misclassifying a worker as an independent contractor instead of an employee can result in severe consequences for the employer, including a failure to pay required payroll taxes on compensation paid to the worker. Trying to fix a misclassification on a prospective basis has, in the past, often presented the issue of whether to also address this retroactively and/or a heightened exposure to the IRS seeking a retroactive reclassification and the associated liability for taxes, interest and penalties. As a result, employers have tended to just stay the course and live with the misclassification risk.

The IRS recently launched a new voluntary correction program, known as the Voluntary Classification Settlement

Program or "VCSP," that allows employers to voluntarily reclassify workers from independent contractors to employees at a greatly reduced retroactive payroll tax cost.

To be eligible for the VCSP, the employer:

1. Must consistently have treated the workers in the past as nonemployees;
2. Must have filed all required Forms 1099 for the workers for the previous three calendar years before the date of the application;
3. Cannot currently be under audit by the IRS, the Department of Labor ("DOL") or a state agency concerning the classification of these workers; and
4. Must have complied with results of a prior examination if the employer was previously audited by the IRS or DOL for the classification of workers.

To participate in the VCSP, the employer must file Form 8952, Application for Voluntary Classification Program.

Form 8952 can be filed at any time, but should be filed at least 60 days before the date the employer wants to begin treating the class or classes of workers as employees.

Employers that are eligible and participate in the VCSP will receive the following relief:

1. The employer only will be required to pay an amount equal to 10% of the employment tax liability that may have been due on compensation paid to the reclassified workers for the most recent tax year (which is approximately 1% of the compensation paid to the reclassified workers for

the most recent year) (the "VCSP Payment");

2. No penalties or interest will be due on the VCSP Payment; and
3. The employer will not be subject to an employment tax audit regarding worker classification for prior years.

*See VCSP on page 3*



### The New Florida Power of Attorney Act

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Florida has adopted a new Power of Attorney Act that will take effect on October 1, 2011. Here are some points about the new Act that you should know:

## GENERAL MATTERS

### *General Nature of Powers of Attorney*

- A power of attorney is a written instrument that grants authority to an "agent" to act in the place of the "principal." A power of attorney may be "durable" (i.e., it is not terminated by the principal's subsequent incapacity) if it contains language indicating that to be the principal's intent. Absent such language, a power of attorney is non-durable, and it is terminated by the principal's subsequent incapacity.

### *Scope of the Act*

- The Act applies to both durable and non-durable powers of attorney

*See Power of Attorney on page 2*

## *Power of Attorney cont...*

created by individuals (with certain exceptions such as proxies and governmental powers of attorney).

- Powers of attorney executed before October 1, 2011 are not rendered invalid by the Act, but their meaning and effect is governed by the Act.

### ***Authority that may not be given to an agent***

- Certain types of authority may not be delegated to an agent under a power of attorney. Accordingly, an agent may not:
  - perform duties under a contract that requires the exercise of personal services of the principal;
  - make an affidavit as to the personal knowledge of the principal;
  - vote in any public election on behalf of the principal;
  - execute or revoke any will or codicil for the principal; or
  - exercise powers and authority granted to the principal as trustee or as court-appointed fiduciary.

### ***Co-agents***

- Unless otherwise provided in the power of attorney, each co-agent may exercise his authority independently.

### ***Acceptance by agent***

- An agent may accept his or her appointment by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance.
- The scope of an agent's acceptance is limited to those aspects of the power of attorney for which the agent's assertions or conduct reasonably manifests acceptance.

### ***Photocopies or Electronic Copies***

- Unless otherwise provided in the power of attorney, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.

## ***Revocation***

- A power of attorney may be expressly revoked in a subsequent power of attorney or other writing signed by the principal, so long as the principal is not incapacitated.
- The principal may, but is not required to, give notice of the revocation to the agent.
- Merely executing a power of attorney does not automatically revoke a power of attorney previously executed by the principal.

### **PROVISIONS ONLY APPLICABLE TO POWERS SIGNED ON OR AFTER OCTOBER 1, 2011**

#### ***No Springing Powers***

- "Springing" durable powers of attorney (i.e., those that only become effective upon the incapacity of the principal) are valid only if the durable power of attorney was executed before October 1, 2011 (with the exception of certain deployment-contingent military powers of attorney that are authorized under the Act).

#### ***Specific estate planning powers***

- Preface: Under Florida law in effect prior to the Act, many durable powers of attorney granted to an agent, who was typically a trusted family member, friend or advisor of the principal, broad "estate planning" powers to make gifts, amend trusts, execute disclaimers, and other powers that could significantly affect the transfer of property of the principal during life or upon death. These powers, if contained in a valid power of attorney executed prior to October 1, 2011, and to the extent they were effective under applicable Florida law prior to the Act, are not rendered invalid by the Act.
- Under the Act, the following "estate planning" powers granted in a power of attorney executed on or after October 1, 2011, will be exercisable by the agent only if the principal signed or initialed next to each

specific enumeration of the authority, the exercise of the authority is consistent with the agent's duties, and the exercise is not otherwise prohibited by another agreement or instrument:

- to create an inter vivos (lifetime) trust;
  - with respect to a trust created by or on behalf of the principal, to amend, modify, revoke, or terminate the trust, but only if the trust instrument explicitly provides for amendment, modification, revocation, or termination by the settlor's agent;
  - to make a gift;
  - to create or change rights of survivorship;
  - to create or change a beneficiary designation;
  - to waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; or
  - to disclaim property and powers of appointment.
- Moreover, unless the power of attorney otherwise provides, a provision in a power of attorney granting general authority with respect to gifts authorizes the agent to only:
    - make a gift of the principal's property to or for the benefit of a person, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed the amount of the federal gift tax annual exclusion (or twice that amount if the principal's spouse consents to split the gift for gift tax purposes); and
    - consent to splitting a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual gift tax exclusions for both spouses.
  - Also, even if the principal has specifically signed or initialed one or more of the specific "estate planning" types of powers described above, unless the power of attorney provides otherwise, an agent who is not an

ancestor, spouse, or descendant of the principal may not exercise authority to create an interest in the principal's property in the agent or in an individual to whom the agent owes a legal obligation of support.

## FIDUCIARY ISSUES

### *Agents are fiduciaries*

- Agents who accept appointment are fiduciaries, and are liable to the principal for failing to carry out their fiduciary duties.

### *An agent's fiduciary duties*

- There are certain mandatory fiduciary duties (i.e., duties that cannot be altered or waived by the terms of the power of attorney) of an agent who has accepted appointment.
  - E.g., to act in good faith.
- There are certain default fiduciary duties (i.e., duties that can be altered or waived by the terms of the power of attorney) of an agent who has accepted appointment.
  - E.g., to act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest.

## RECOMMENDATIONS

Although each situation is unique, in view of the facts and issues described above, we recommend that you:

1. Consider executing a new durable power of attorney to include whatever specific "estate planning" type powers you may wish to include, rather than entirely relying on more general types of powers included in a pre-October 1, 2011 durable power of attorney.
2. Consider executing a new durable power of attorney to make clear that all business and investment activities are included, including banking and investment powers listed in the Act that may be incorporated by reference in a power of attorney.
3. Consider preserving a pre-October 1,

2011 "springing" durable power of attorney that is conditioned upon your incapacity, since springing powers signed on or after October 1, 2011 will not be effective.

We would be pleased to discuss with you how the new Act may impact your specific situation and how best you can comply with the provisions of the new Act. Call one of our estate planning attorneys listed below to discuss any questions you may have regarding durable powers of attorney or otherwise.

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## VCSP cont...

To participate in this program, the employer must agree to extend the statute of limitations on assessment of employment taxes from the normal three year period to six years for the first, second and third calendar years after the VCSP closing.

Although the VCSP provides relief from unpaid payroll taxes, employers must be aware of other consequences arising from the reclassification of employees. The areas in which the VCSP provides no relief include:

1. The impact of the failure in the past to make any required pension contributions to a qualified plan with respect to the reclassified workers;
2. The impact of the failure in the past to provide health and welfare benefits to the reclassified workers; and
3. The impact of the failure to comply with wage and hour laws applicable to the reclassified workers.

For many employers, the VCSP provides an excellent opportunity to begin the proper classification of workers as employees at a modest tax cost. However, proceeding under the VCSP program can open up a Pandora's box that heightens the exposure to other costs and consequences. Thus, all implications arising from the reclassification of workers should be considered and evaluated with your lawyer or accountant before deciding to seek relief under the VCSP.

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Five Tremam Kemker attorneys named Tampa Bay's 2012  
"Lawyer of the Year" by The Best Lawyers in America®

Trenam Kemker is pleased to announce that twenty-nine of our lawyers have been named by their peers to the 2012 edition of *The Best Lawyers in America*, the oldest and most respected peer-review publication in the legal profession. Five were recognized as "Lawyer of the Year" for their practice area. Tremam Kemker has the most "Lawyers of the Year" in the Tampa Bay area. The following attorneys were recognized:

**Thomas D. Aitken**  
Trusts & Estates

**J. Alan Asendorf**  
Real Estate Law  
Litigation - Real Estate

**Paul D. Bain**  
Eminent Domain/  
Condemnation Law

**Marvin E. Barkin**  
*Tampa Litigation -  
Banking & Finance  
Lawyer of the Year*  
Bet-the-Company  
Litigation  
Commercial Litigation  
Litigation - Real Estate;  
Securities

**David R. Brittain**  
Real Estate Law

**Robert H. Buesing**  
Commercial Litigation  
Construction Law  
Eminent Domain/  
Condemnation Law

**Nelson T. Castellano**  
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**Robert C. Decker**  
Real Estate Law

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Labor & Employment

**William C. Frye**  
Bet-the-Company Litigation  
Commercial Litigation  
Litigation - Construction

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Bankruptcy/Creditor-  
Debtor Rights Law  
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**Richard O. Jacobs**  
Health Care Law

**Charles F. Ketchey, Jr.**  
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Corporate Governance Law  
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**J. Eric "Tate" Taylor**  
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Health Care Law

**William K. Zewadski**  
Bankruptcy/Creditor-  
Debtor Rights Law  
Litigation - Bankruptcy

Trenam Kemker Welcomes  
Two Attorneys



**Paul D. Bain** has joined the firm as Senior Counsel. Paul's practice focuses primarily on the areas of eminent domain, property rights litigation, and inverse condemnation. He will be based in the firm's Tampa office. Prior to joining the firm, Paul was a founding partner at a firm exclusively practicing in eminent domain and property rights litigation. He began his career in 1993 with a civil litigation firm representing owners and businesses in eminent domain and became a partner in 1998. Paul has represented individuals and corporations throughout the state of Florida for more than 18 years.



**Andrew J. J. Collinson** is an Associate in the Commercial Litigation Practice Group and will be based in the firm's St. Petersburg office. Prior to joining the firm, Andrew was a judicial law clerk to the Honorable Emmett Ripley Cox of the U.S. Court of Appeals for the Eleventh Circuit. Prior to that, he was a judicial law clerk to the Honorable Richard Smoak, Jr. of the U.S. District Court for the Northern District of Florida. Andrew was an officer in the U.S. Coast Guard from 2001 to 2005, where he served overseas in support of Operation Iraqi Freedom and received several awards.

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For specific advice on any topic, please contact your legal advisor.