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of disenfranchisement and unless the applicant is found to be "qualified under state law to vote".

Citizens concerned with the civil rights cause can only hope that the 1960 legislation will make possible a more complete Negro franchise, and will not hamper future efforts to achieve better legislation if the hope is unfulfilled. The fundamental problem of state qualification laws has not been tackled. The procedures established under the 1960 legislation are not sleek, simple or swift. It cannot be said now that the proposed law represents a significant advance, although in practice it may prove better than it seems.

JOSEPH P. JOSEPHSON

THE USE OF INDEPENDENT CONTRACTORS TO MINIMIZE EMPLOYMENT TAXES—THE DOUBTFUL CASES

The social security and unemployment taxes due from proprietors are based upon wages paid employees. If services are performed by independent contractors the compensation afforded is free of these taxes.¹ The 1958 amendments to the Federal Insurance Contributions Act (FICA) increased the amount due from both employer and employee to 3% of the wages paid.² Unemployment taxes which are paid by the employer remained at 2.7% to the state and .3% to the federal government.³

This increasing tax and ever-constant bookkeeping burden can be alleviated if the individual performing the services could be placed on an independent contractor basis. The independent contractor would thereupon be liable to pay 4½%

¹ 26 U.S.C. (I.R.C. 1954) § 3306.

² 26 U.S.C. §§ 3101, 3111 as amended 1958. The Federal Insurance Contributions Act requires that a certain amount (currently 3%) be withheld from wages paid employees and that an equal amount be contributed by the employer toward the Social Security Fund.

³ The Federal Unemployment Tax Act (FUTA) 26 U.S.C. § 3301 requires that an amount equal to 3% of wages paid be deposited in the federal fund but a credit up to 90% of that due is given to contributions made to state unemployment funds that qualify under federal standards. All states enacted the requisite unemployment tax laws and the 2.7% due to state funds became uniform. Many state laws so passed gave a more restrictive definition of independent contractors so that some individuals might be exempt from FUTA taxes but liable under the state unemployment tax acts (SUTA).

of his income under the Self Employment Contributions Act of 1951,⁴ for which he will receive social security benefits. This shift of tax responsibility will be more in accord with those conservative objections to the Social Security Act of 1935 which stated that the burden should rest more directly on those benefitting. Unemployment taxes and benefits do not apply to independent contractors at all.

The basic distinction between an independent contractor and an employee is that as to an employee the proprietor has the right to interfere and supervise the manner of performance but may only govern the results produced by the independent contractor. More simply, if the businessman has the right to control not only what is to be done but how it shall be done, the one rendering the service is an employee. Note that if the right to interfere is retained, the employee relationship is established regardless of actual interference. This is the common law test and other distinctions, such as ownership of tools and supplies, are used as aids by the court in arriving at the control test when the intentions of the parties are difficult to ascertain.

The common law test is the sole criterion used in judging the relationship for federal payroll tax purposes.⁵ Additional tests required to be met for unemployment tax purposes in some states will be discussed later. In passing on this question in 1947,⁶ the Supreme Court used one of these court-developed aids. Some critics supposed that the Court had narrowed the concept of independent contractor. The Court said that an employee is "dependent as a matter of economic reality upon the business to which he renders service and not upon his own business as an independent contractor." On the basis of the decision the Treasury Department proposed to issue a regulation that would have reduced independent contractors to employees if the individual's work was an integral part of the business to which he rendered service, if there was not sufficient investment in the facilities for work nor opportunity for profit and loss, or if there was not sufficient skill required.⁷ As proposed, the more restrictive regulation would have equated independent contractors to independent businessmen with a certain amount of assets and freedom from reliance on one large account.

Congress did not admit that the decision had altered the common law definition and prevented the issuance of the regulation by passage over a presidential veto of a joint resolution to re-establish the *status quo* if such had been disturbed.⁸ The control test thereby remained definitive for federal employment tax purposes regardless of interpretation of the Supreme Court decision.

⁴ 26 U.S.C. § 1401.

⁵ *Benson v. Social Security Board*, 172 F.2d 682, 685 (C.A. 10th, 1949).

⁶ *United States v. Silk and Harrison v. Greyvan Lines, Inc.*, 331 U.S. 704 (1947).

⁷ Senate Report No. 1255 and House Report No. 1314, Feb. 3, 1948 (To accompany H. J. Res. 296).

⁸ Joint Resolution of June 14, 1948, 62 STAT. 438.

In performing a legal check up for a business client the practitioner might have occasion to advise that some individuals on the payroll do not require control of the manner of their performance. The lawyer can suggest an independent contract relationship with these individuals and a written agreement will be in order. The considerations that are to be drafted into the contract will vary with specific jobs. There is little reported law on the borderline cases and the subject must be approached by speculating how the courts will look at each arrangement. Many doubtful cases come to mind such as nurses, musicians, music teachers, watchmen, chefs, tutors and janitors. Each must be treated in the light of his own circumstances. For illustrative purposes the janitor's situation is the most striking because of the apparent incongruity for someone performing such menial tasks to be considered an independent contractor. The Commission ruled janitors to be employees in 1937,⁹ but the decision did not involve any attempt on the part of the taxpayer to contract away the right to control the means of performance.

A janitor case was adjudicated during 1959 and is worthy of note. The taxpayer was an owner of a number of apartment houses which were cared for by persons who received in return for their services all or a part of the rent for the apartments which they occupied. The Director of Internal Revenue assessed federal social security and unemployment taxes against the property owner on the theory that the caretakers were employees and not independent contractors, the fair value of rent afforded them being compensation for such employment. These taxes, aggregating about \$6700, were paid under protest and a claim was made for refund. The claim was rejected and this action was brought for recovery. The District Court denied relief and the United States Circuit Court of Appeals for the 8th Circuit affirmed.¹⁰

After considering the facts of the case the court could not include the janitors here in its definition of an independent contractor as "one who engages to perform a certain service for another according to his own manner and method free from the control and direction of his employer in all matters connected with the performance of the service except as to the result of the work." The decision need not be questioned. The fact that the services were not paid for in cash is immaterial to the assessment of the federal social security and unemployment taxes here involved. There is a body of law not to be analyzed here that determines the taxability, mostly for income purposes, of board and lodging. Lodging is generally

⁹ S.S.T. 172, 1937-2 Cum. Bull. 385. Janitors who serve several property owners, attending to furnaces, cleaning halls, etc., of apartment buildings, and who are unrestricted as to the hours they work but are engaged to give the necessary attention to such duties, are employees of the persons for whom they perform services within the meaning of Title VIII and IX of the Social Security Act.

¹⁰ *Beatty v. Halpin*, 267 F.2d 561 (C.A. 8th, 1959).

non-taxable if it is required by the proprietor as a condition of service for the convenience of the one providing it rather than the one enjoying it.¹¹

Considering the independent contractor aspects of the decision the case is most valuable for its negative implication, *i.e.*, the taxpayer would have avoided liability if the right to control the manner of performance had not been retained. The performance of services was isolated and the janitor of each building was probably "his own boss" in a practical analysis. It is submitted that the right to control could have been contracted away without real jeopardy to the business. Anticipating that the court will look through such a contract to ascertain the real situation, attention must be given to certain aspects that courts have examined in the past.

The fact that a businessman intends the contract as a tax saving measure is not a serious difficulty. In speaking of the Social Security Act a New York Federal court in 1954 stated: "It is not unlawful to conduct business through independent contractors to avoid impact of this chapter."^{11a} The fact that payment is in the form of a periodic salary is no real barrier either. The Treasury Department in Circular E (Revised Jan. 1960) under Section 4A "Who Are Employees" stated: "It does not matter how the payments are measured or how they are paid or what they are called. Also it does not matter whether the individual is employed full or part time."

The courts sometimes looked to whether the individual rendering the service has provided the tools and supplies necessary¹² and it would be helpful to include the provision in the contract although it does not appear to be essential to the control test. In the janitor situation, however, it would not be feasible considering the initial expense to the janitor of power mowers, hedge clippers, floor waxers, and such gadgets. Since maintenance needs are tailored to the building these items come with it and supplies are obtained on the owner's account at a nearby store in normal business practice. This tools and supplies aspect could be used to the taxpayer's advantage in the case of nurses or musicians.

However, two of the tests developed by the courts do go to the essence of the relationship and must be considered in drafting the contract. If personal performance is demanded by the proprietor,¹³ control of the means is retained to a certain extent in that limitation of the labor to one person will serve to assure a manner of performance consistent with past performances of that individual. The second test concerns the right to summary discharge¹⁴ and goes to the nature of the "contractor" aspect rather than the "independent" modification. It raises

¹¹ 26 C.F.R. (INT. REV. CODE, 1954) 1.119-1(b).

^{11a} *Silver v. United States*, 131 F. Supp. 209 (N.D.N.Y. 1954).

¹² 26 C.F.R. 31.3121(d)-1.

¹³ Treasury Department Circular E (Revised Jan. 1960) § 4B.

¹⁴ *Norling v. Johnston*, 205 Or. 315, 283 P.2d 994 (1955).

the question of whether the intent to assume contractual obligations and the inherent liability for termination of the relationship without cause exist at all. It would be advisable that demands for personal performance and the right to summary discharge be expressly denied in the contract. In the janitor situation the owner should be able to discharge only for cause but the janitor may terminate the relationship without it. Such termination should be accompanied by a notice period, *e.g.*, two weeks. Lacking cause the owner may terminate without liability only at a certain time as when the contract is automatically renewable annually if the owner does not give notice of termination sixty (60) days prior to the anniversary date. Of prime concern to landlords is the sobriety and general conduct of the janitors but, mindful of the common law test, cause to discharge must not stem from inadequate manner of performance. To assure proper conduct it could be stipulated that one of the janitor's many duties specified in the agreement is to promote the apartment house owner's good will both as to tenants and the public.

By way of summary then the proposed contract with the janitor will be explicit on the following points. The janitor is charged to maintain good will with the tenants and the public. The apartment house owner has no right to control the manner in which the janitor fulfills his duties. The janitor is not under an obligation to perform the work himself. Termination of the relationship by the apartment house owner without cause and notice will render him liable for damages.

The provisions outlined above are merely suggested for consideration. Each case must be decided in the light of its individual circumstances. A ruling should be requested from the Internal Revenue Service by submission of all the attendant circumstances on Form SS-8. A photostat of any executed contract can be attached to the request. Being satisfied that the independent contractor relationship has been established for FICA and FUTA tax purposes, the state requirements must be considered to determine whether the proprietor might yet be liable under the particular state's unemployment tax act. This is a major consideration since the state liability constitutes 90% of the unemployment tax or an amount equal to 2.7% of the payroll.

Popular concepts of independent contractors that motivated the Supreme Court to decide as it did in 1947 also caused some states to require certain tests in addition to that of the common law. One such test requires that the independent contractor perform services outside the usual course of the employer's business or outside the employer's place of business. Another test requires that he be established in an independent business. Kansas adds the former and Indiana, Oregon, Pennsylvania, and Wisconsin add the latter requirement to the control test. Oklahoma and Virginia require control and either additional test. Twenty-five

more states¹⁵ require all three tests to be met. It would be difficult for the janitor to meet either of these additional tests. New York says merely that employment means service under any contract of employment for hire, express or implied, written or oral, without defining independent contractor. In the remaining states control of the manner of performance remains the sole test and an attempt to obtain a ruling similar to the federal procedure would seem to be indicated in these states for the doubtful situations.

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¹⁵ Alaska, Delaware, Georgia, Hawaii, Illinois, Louisiana, Maryland, Maine, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia and Wyoming.