

## Message from Our Office

In this inaugural issue of our *Update*:

- James Wodarski and Stephen P. Cole report on how the International Trade Commission has clarified the role of intellectual property licensing in establishing a domestic industry.
- Todd Reinstein and Jeffrey Libson explain IRS Issues Notice 2010-45, which offers guidance on the Qualifying Therapeutic Discovery Projects credits program.

We're also pleased to announce these new enhancements to Pepper services:

- part of Pepper's International Practice Group, our new Italian Desk is designed to serve as a bridge between Italian and U.S. businesses.
- our new Independent Contractor Compliance Practice Group can advise and assist clients on an interdisciplinary basis, as Congress moves to make employee misclassification a federal labor law violation. The group is hosting a Breakfast Briefing Series on this vital issue for employers and businesses. See page 8 for details.

We also note other events and webinars, including an episode of *The Deal* and Pepper Hamilton's Legal Roadmap to Success podcast series: "Distressed Debt."

We welcome your comments, questions and suggestions.

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## Congress Moves to Make Employee Misclassification a Federal Labor Law Violation *In Response, Pepper Creates Independent Contractor Compliance Practice Group*

RICHARD J. REIBSTEIN | [REIBSTEINR@PEPPERLAW.COM](mailto:REIBSTEINR@PEPPERLAW.COM)

On April 22, 2010, a long-awaited bill addressing the issue of misclassification of employees as independent contractors was introduced by the House (Rep. Lynn Woolsey, D-CA) and Senate (Sen. Sherrod Brown, D-OH). The bills, H.R. 5107 and S. 3254, are called the Employee Misclassification Prevention Act (EMPA). They would amend the federal Fair Labor Standards Act to impose strict recordkeeping and notice requirements on businesses with respect to workers treated as independent contractors, and expose such businesses to fines from \$1,100 up to \$5,000 per employee for each violation of the law.

The purpose of EMPA is to curtail and penalize the practice of many businesses in the United States of misclassifying employees as independent contractors. This practice has reportedly contributed to the "tax gap" at both the federal and state level, as well as a loss of federal and state labor protections for those workers that, by law, should be classified as employees instead of as independent contractors.

EMPA does not prohibit businesses from continuing to use properly classified independent contractors; it only prohibits companies from misclassifying workers as independent contractors when such workers are really employees.

Nonetheless, all businesses would be affected by EMPA, because it imposes upon every company that uses either employees or independent contractors a recordkeeping and a notice requirement.

This publication may contain attorney advertising.

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Any business that fails to provide the required notice would be subject to fines, even if its independent contractors are properly classified.

Briefly, if enacted into law as drafted, EMPA would:

- require every company covered by the law to provide a written notice to all workers who perform labor or services informing them that they have been classified as either an employee or “non-employee,” directing them to a Department of Labor Web site for further information about the rights of employees under the law, and informing them to contact the Department of Labor if they have any questions about whether they have been misclassified
- require companies which are now required to keep records of the hours of work and wages of employees to keep comparable records for “non-employees” providing labor or services to the business
- add a new provision making it a “prohibited act” under federal law to fail to accurately classify a worker as an employee (i.e., to misclassify a worker as a non-employee)
- impose upon businesses a penalty from \$1,100 to \$5,000 per worker for a violation of the notice or recordkeeping requirements or for misclassifying an employee as a non-employee, and
- impose triple damages for willful violations of the minimum wage or overtime laws where the employer has misclassified the affected employee.

In addition, EMPA would direct the Secretary of Labor to:

- establish a misclassification Web site that would enable workers to file complaints online and notify them that employees may have greater rights under state or local laws than under federal law
- amend the Social Security Act to establish penalties for misclassifying employees or for paying unreported wages to employees for unemployment compensation purposes
- authorize the Department of Labor to report misclassification information to the IRS, and
- direct the Department of Labor to conduct “targeted audits” of certain industries “with frequent incidence of misclassifying employees as non-employees.”

#### PEPPER HAMILTON ATTORNEYS’ NEW BLOG ADDRESSES INDEPENDENT CONTRACTOR COMPLIANCE

Pepper Hamilton’s Independent Contractor Compliance Practice Group leaders have launched a blog at [www.independentcontractorcompliance.com](http://www.independentcontractorcompliance.com), which includes a comprehensive set of legal resources for companies and lawyers seeking information about independent contractor misclassification, and which will track and comment on developments in the law. Richard Reibstein, Lisa Petkun and Andrew Rudolph have been handling worker classification matters for more than 20 years. As part of Pepper’s interdisciplinary practice in this field of law, they address this issue from the labor, tax and employee benefits law perspectives.

The proposed legislation also seeks to pierce the corporate veil of corporations, partnerships, and LLCs owned in whole or part by the worker and used to avoid the issuance of Form 1099s.

EMPA is one of two bills introduced in this legislative term that deal with misclassification of employees. In 2009, the House and Senate introduced the Taxpayer Responsibility, Accountability, and Consistency (TRAC) Act of 2009 (S. 2882 and H.R. 3408). If enacted, the TRAC Act would limit the availability of the so-called “safe harbor” provisions in Section 530 of the Revenue Act of 1978, which has been relied on by many businesses to designate workers as independent contractors for federal employment tax purposes. The TRAC Act also would afford workers the right to petition the IRS for a determination of the worker’s status, and increase penalties of up to \$1 million to \$3 million for intentional disregard by taxpayers filing incorrect Form 1099s. Both houses of Congress are expected to reintroduce TRAC Act bills in 2010 that are similar or identical to those bills introduced in 2009.

The introduction of EMPA is consistent with the national labor policy of the Obama administration. The recently released Budget for Fiscal Year 2011 authorized \$25 million to the Department of Labor to target employee misclassification through the hiring of 90 additional investigators and 10 additional lawyers to pursue “a joint proposal that eliminates incentives in law for em-

ployers to misclassify their employees” and “enhances the ability of both agencies to penalize employers who misclassify.”

In anticipation of this proposed legislation on employee misclassification, Pepper has created its Independent Contractor Compliance Practice Group ([http://www.pepperlaw.com/PracticeArea\\_preview.aspx?PracticeAreaKey=72](http://www.pepperlaw.com/PracticeArea_preview.aspx?PracticeAreaKey=72)). This practice team focuses on the interrelated legal issues involving independent contractors by using an interdisciplinary approach along with unique proprietary tools and techniques to diagnose and enhance compliance with independent contractor laws.

We also have prepared an article (available online at [http://www.pepperlaw.com/publications\\_article.aspx?ArticleKey=1769](http://www.pepperlaw.com/publications_article.aspx?ArticleKey=1769)) that explains steps employers should take now to minimize the risks posed by the use of independent contractors.

Pepper’s Independent Contractor Compliance Practice Group includes more than 25 employment, tax, and employee benefits attorneys working collectively. We have a dual approach: first, to assist organizations that currently use independent contractors to do so in a permissible manner under applicable employment, tax and employee benefits laws and to minimize exposure to liability

from such laws; and second, to defend organizations that are subject to misclassification challenges brought in judicial and administrative proceedings and audits by governmental agencies and private lawyers.

Our team members understand that an audit by an unemployment or workers’ compensation agency of a company’s use of independent contractors may also lead to legal challenges in the tax and employee benefits areas, and vice versa. When asked by clients to enhance their legal compliance with independent contractor laws, we examine the issues and propose compliance measures from all three related legal disciplines – tax, employee benefits, and labor/employment law – using our proprietary tools, including “IC diagnostics” based on continually updated legal research.

More information about Pepper’s Independent Contractor Compliance Practice Group may be obtained by contacting any of the group’s co-chairs: Richard J. Reibstein (employment/labor matters) at 212.808.2722 or [reibsteinr@pepperlaw.com](mailto:reibsteinr@pepperlaw.com); Lisa B. Petkun (tax matters) at 215.981.4385 or [petkunl@pepperlaw.com](mailto:petkunl@pepperlaw.com); or Andrew J. Rudolph (employee benefits matters) at 215.981.4749 or [rudolpha@pepperlaw.com](mailto:rudolpha@pepperlaw.com).



## The Deal and Pepper Hamilton’s Legal Roadmap to Success - Distressed Debt

There are a number of hot-button legal topics interesting to dealmakers at the moment. What key legal issues should you be thinking about in the coming months? Hear thoughtful perspectives in this series of incisive podcasts from The Deal and Pepper Hamilton LLP.

# The Deal

### EPISODE 5: PEPPER HAMILTON ON DISTRESSED DEBT

In this 2010 Legal Roadmap to Success podcast sponsored by Pepper Hamilton, partners William R. Wagner and John P. Duke discuss distressed debt with The Deal’s Maria Woehr.

Listen today by visiting <http://www.thedeal.com/knowledge/legal-roadmap-to-success/pepper-hamiltons-wagner-and-duke-on-distressed-debt.php>.

## International Trade Commission Clarifies Role of Intellectual Property Licensing in Establishing Domestic Industry

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The International Trade Commission (ITC), a federal agency established to protect U.S. industries from unfair trade practices of foreign companies, has issued a decision clarifying the role that a company's intellectual property licensing activities have in establishing a domestic industry. The ITC stated that a complainant's traditional licensing activities, including both direct negotiations and patent infringement litigation, standing alone, may satisfy the statutory requirement that the party filing a §337 claim must prove that a domestic industry exists, or is being established, for the articles it claims are protected by the asserted patents, or other intellectual property rights such as trademarks or copyrights. Previously, a question existed whether a complainant's investment in enforcement activity such as litigation could be used to prove the existence of a domestic industry. The decision in *Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same* (Inv. No. 337-TA-650) states that the answer to that question is yes.

The ITC has become an important venue for patent disputes because of its power to issue orders barring the importation of goods that infringe on U.S. patents. A 2006 Supreme Court ruling made it much more difficult to obtain broad injunctions against infringing goods in federal court, so patent holders are increasingly turning to the ITC for relief. Very few practitioners, however, are experienced in the rules and requirements of litigation before the ITC. Pepper Hamilton LLP is one of those few firms.

Under §337, a domestic industry exists where a company can show that it has made a material investment in activity that is sufficiently related to the use and exploitation of its asserted intellectual property rights. A complainant can prove a material investment in one of three ways, through: (a) a significant investment in plant and equipment; (b) a significant investment in labor or capital; or (c) a substantial investment in the exploitation of the company's intellectual property, including engineering, research and development, and/or licensing. As the *Coaxial Cables* decision clarifies, any sufficiently related licensing activity,

AS THE *COAXIAL CABLES* DECISION CLARIFIES, ANY SUFFICIENTLY RELATED LICENSING ACTIVITY, INCLUDING LITIGATION, MAY BE USED TO PROVE THE EXISTENCE OF A DOMESTIC INDUSTRY.

including litigation, may be used to prove the existence of a domestic industry.

Earlier this year, Pepper Hamilton LLP successfully argued that a technology company satisfied the domestic industry requirement through the activities and investments of its patent licensee; specifically the licensee's engineering and research and development. This was the landmark case of *Certain Electronic Devices Including Handheld Communications Devices*, (Inv. Nos. 337-TA-673 and 337-TA-674), which caused ripples in the intellectual property field.

Now, in *Coaxial Cable*, the ITC has not only confirmed its ruling in the *Certain Electronic Devices Including Handheld Communications Devices* investigation but also confirmed that a company can establish a domestic industry by its licensing activities *alone*, without regard to the licensee's activities. The ITC provided examples of licensing activities that may satisfy the domestic industry requirement, such as drafting and sending cease and desist letters; filing and conducting a patent infringement litigation; conducting settlement negotiations; and negotiating, drafting, and executing a license, provided that each activity is "clearly link[ed] to licensing efforts concerning the asserted patent." While patent litigation does not necessarily satisfy the federal

statute's domestic industry requirements, "patent litigation activities (including patent infringement lawsuits) may satisfy these requirements if a complainant can prove that these activities are related to licensing and pertain to the patent at issue, and can document the associated costs."

This new rule has opened the door to many companies and universities that would otherwise not be able to take advantage of the ITC's quick turnaround time (about a year) and ability to prevent infringing products from entering the United States. "Technology companies no longer have to wait until they or a licensee invest in developing a product before enforcing their intellectual property rights at the ITC," says William D. Belanger, the head of Pepper Hamilton's ITC practice. "This will give small and mid-sized technology companies greater access to the ITC to protect their intellectual property."

Companies interested in learning more about how they can best protect their intellectual property rights, and, specifically, how pursuing that goal at the ITC may work to their best advantage, can contact Mr. Belanger in Pepper's Boston office, at 617.204.5101 or [belangerw@pepperlaw.com](mailto:belangerw@pepperlaw.com).

## IRS Issues Notice 2010-45 with Application Criteria for New Section 48D

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On May 21, the Treasury Department released Notice 2010-45 (Notice) for guidance on the Qualifying Therapeutic Discovery Projects credits program under Section 48D. As we described in our April 6 *Client Alert* ([http://www.pepperlaw.com/publications\\_article.aspx?ArticleKey=1749](http://www.pepperlaw.com/publications_article.aspx?ArticleKey=1749)), to qualify for the credit, taxpayers must receive a certification from the IRS that they have a Qualifying Therapeutic Discovery Project (QTDP) before they claim the credit on a federal income return or receive a grant in lieu of the credit.

### BACKGROUND ON SECTION 48D

The Health Care and Education Reconciliation Act established the investment tax credit for certain expenditures related to a QTDP made in 2009 or 2010 under newly created Section 48D for eligible taxpayers with fewer than 250 employees.<sup>1</sup> The federal credit is equal to 50 percent of the aggregate costs paid or incurred in a taxable year that are directly related to a QTDP. Importantly, the new provision also permits the Treasury to provide taxpayers with a grant in lieu of the tax credit, so that even companies that are unable to use the tax credit to offset future taxable income may receive the cash grant.

A QTDP is a project designed to develop a product, process or therapy to diagnose, treat, or prevent diseases and afflictions by: (1) conducting pre-clinical activities, clinical trials, clinical studies, and research protocols, or (2) by developing technology or products designed to diagnose diseases and conditions, including molecular and companion drugs and diagnostics, or to further the delivery or administration of therapeutics.

### NOTICE 2010-45

The Notice and its appendices provide applicants with the information required to be submitted for taxpayers seeking a U.S. Department of Health and Human Services (HHS) recommendation, as well as information to be supplied to the IRS for certification. The Notice also provides a series of helpful definitions and rules for eligible applicants. Key rules to note include:

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- each taxpayer will be eligible to certify a maximum of \$10 million in eligible costs, which results in a maximum credit/grant of \$5 million
- partial awards may be given
- a taxpayer must submit a separate application for each QTDP
- the cost of leased employees may be allocated were appropriate to the qualifying costs, but they do not count toward the 250 employee maximum for preliminarily qualifying for the credit
- grants received that were not included in taxable income will reduce the amount of qualified costs that may be submitted
- if the amount of the taxpayer's certification by the IRS is based on a qualified investment expected to be made, and the amount certified exceeds the taxpayer's actual qualified investment for 2009 and 2010, then the credit allocated to the taxpayer shall be reduced by 50 percent of the difference between the qualified investment certified by the IRS and the taxpayer's actual qualified investment
- any denials cannot be appealed
- government and tax-exempt entities are not eligible applicants.

#### CERTAIN MEDICAL DEVICES MAY QUALIFY

Appendix A of the Notice states that to qualify, a QTDP must be a product, process, or technology that furthers the delivery or administration of therapeutics and that the term "therapeutics" means drugs or medical devices, as those terms are defined in Section 201(g) and (h) of the FFDCFA, 21 U.S.C. 321(g) and (h). Biologics that are licensed under the PHSA will generally be either drugs or medical devices.

The Appendix has an example of a drug-eluting stent or infusion pump as meeting the requirements of this provision. A medical device, or other product, process or technology, however, that does not further the delivery or administration of a drug or medical device would not meet the requirements of the Notice because those types of products do not deliver or administer a therapeutic. Products, processes or technologies that deliver other therapies that are not therapeutics, such as speech, physical and cognitive therapies, are excluded.

#### CERTIFICATION PROCEDURES

To receive a certification, the taxpayer must submit for each project a Form 8942, "Application for Certification of Qualified Investments Eligible for Credits and Grants Under the Qualifying Therapeutic Discovery Project Program," a penalties of perjury statement, a power of attorney, and a consent for public disclosure of the certification.

Also, applicants will need a Data Universal Numbering System (DUNS) number from Dun and Bradstreet when applying. Taxpayers may want to get a DUNS number ahead of time due to the short window to apply.

#### IMPORTANT DATES

Form 8942 will be released by the Treasury on June 21, 2010, and the complete application must be submitted by July 21, 2010, giving eligible taxpayers a 30-day window to apply. IRS will make award certifications no later than Oct. 29 according to the Notice.

#### PEPPER PERSPECTIVE

The Notice makes it clear that the IRS and HHS will be looking for projects that can reasonably result in new ways to meet unmet medical needs; to reduce long-term U.S. health care costs; to prevent, treat, or detect chronic illnesses; or to significantly further the goal of curing cancer within 30 years. Applicants should clearly state the illness the company is attempting to cure or treat, the need that exists for a cure or treatment, and how it will overcome any barriers to the cure. The Notice also makes it clear that applicants need to demonstrate that their science will result in future U.S. jobs and make the U.S. economically competitive around the world.

This process will be very competitive and the Notice states that the IRS anticipates 1,200 applicants. With those criteria in mind, eligible applicants should begin to gather their data and information in anticipation of the 30-day window. Applicants are encouraged to follow all of the instructions in the Notice since applications that fail to comply with the instructions set will not be considered.

#### ENDNOTES

- 1 Unless otherwise stated, all references to "Section" are to the Internal Revenue Code of 1986 (the Code), and all references to "Treas. Reg. Section." are to the Treasury Regulations promulgated thereunder (the Regulations).

## Pepper Hamilton Announces Formation of Italian Desk as Bridge Between Italian and U.S. Businesses

Continuing its long history of assisting Italian companies and individuals in their business endeavors in the United States, and American companies and individuals investing and conducting business in Italy, Pepper Hamilton LLP has formed its Italian Desk, part of the firm's continued development of its International Practice Group.

The Italian Desk, a multi-disciplinary team of attorneys and professionals, has strong credentials and experience in a variety of practice areas and in many industries, including fashion and retail, manufacturing, food and beverage, pharmaceuticals and life sciences, financial services, technology and energy.

Pepper Hamilton partners Joseph V. Del Raso and Frank J. Cerza, co-chairs of Pepper Hamilton's Italian Practice Group, co-announced the creation of the Italian Desk. "We are very excited about the Italian Desk as a way to provide value to companies in both countries by bringing to bear our legal and business skills, client experience and relationships, and deep understanding of the similarities and differences between the Italian and American cultures," Del Raso said. "This effort is part of Pepper Hamilton's commitment to providing a bridge between Italian business and U.S. opportunities, and vice versa."

Cerza said the members of Pepper Hamilton's Italian Desk are uniquely positioned to serve not only as business lawyers, but also as business advisors. "We certainly have the depth of knowledge of real estate; corporate and securities matters; commercial litigation, arbitration and other forms of dispute resolution; tax; mergers and acquisitions; trade; intellectual property; and regulatory, labor and other matters that Italian companies will encounter as they establish or expand their business in the United States," he added. "In addition, Joe and I also had experience in business, before we were lawyers. So, with the help of a deep Pepper Hamilton bench, the Italian Desk also offers strategic and business planning advice on corporate formation, site selection, distribution, licensing and franchising approaches, tax planning and other areas."

The Italian Desk also advises clients about:

- entry and growth in the U.S. market
- venture capital and private equity
- cross border transactions, such as investments, joint ventures and dispositions of assets or businesses
- facilitating access to private investment funding
- sales of goods and services
- establishment of business operations in Italy
- Foreign Corrupt Practices Act and related compliance and enforcement issues.

Both Del Raso and Cerza pointed out that the benefits the Italian Desk offers to clients are enhanced by the firm's strong relationships with Italian law firms and key commercial and financial institutions as well as federal, state and regional governmental and regulating bodies in the United States and Italy.

Del Raso, a Pepper Hamilton commercial partner, also is president of the National Italian American Foundation and chairman of the board of trustees of The American University of Rome. Cerza, a member of the Board of the Italy-America Chamber of Commerce, Inc. and Honorary Representative of the American Chamber of Commerce in Italy for the State of New York, has lived in Italy and is fluent in Italian.

For more information about Pepper Hamilton's Italian Desk, contact Frank Cerza at 212.808.2741 or [cerzaf@pepperlaw.com](mailto:cerzaf@pepperlaw.com), or Joseph Del Raso at 215.981.4506 or [delrasoj@pepperlaw.com](mailto:delrasoj@pepperlaw.com).

## Independent Contractor Compliance Breakfast Briefing Series

**Tuesday, July 13, 2010 | Pepper's Berwyn Office**

400 Berwyn Park | 899 Cassatt Road | Berwyn, PA

7:30 a.m. - Registration and Breakfast | 8:00-10:00 a.m. - Panel Presentation | 10:00-11:00 a.m. - Question & Answer Session

Pepper Hamilton's Independent Contractor Compliance Practice Group is pleased to present a Breakfast Briefing highlighting the legal and legislative challenges facing employers that use independent contractors, and focusing on ways businesses can continue to use independent contractors in compliance with applicable labor, tax and employee benefit laws.

In the face of mounting evidence that many employers throughout the nation have misclassified employees as independent contractors as a cost-saving measure, businesses that use contingent workers to complement their workforce have been targeted by the IRS and state workforce agencies, state legislatures, Congress, plaintiffs' class-action lawyers and unions.

The issue has gained much national attention with President Obama's new budget for 2010-11 authorizing an additional \$25 million in federal funds for the U.S. Department of Labor and the IRS to "target misclassification." Also in late April 2010, both houses of Congress introduced the Employee Misclassification Prevention Act (EMPA). If passed as expected this year, EMPA would make misclassification a federal labor offense, create new recordkeeping and notice obligations for businesses, impose hefty penalties for misclassification, and authorize the filing of lawsuits by workers who believe they have been misclassified.

Pepper's Independent Contractor Compliance practice group focuses on the interrelated legal issues involving independent contractors by using an interdisciplinary approach, along with proprietary tools and techniques, to diagnose and enhance employers' compliance with independent contractor laws.

Join us as we discuss how companies using contingent workers can comply with the new legal landscape and minimize or avoid exposure to misclassification liability. We will also discuss our proprietary tools for enhancing corporate compliance with existing and anticipated legislation regarding proper classification of contingent workers.

Following the Breakfast Briefing, each presenter also will be available for a follow-up Q-and-A session for attendees.

### MODERATOR

Michael J. Molder, Marcum LLP

*Senior manager*

### SPEAKERS

Lisa B. Petkun, Pepper Hamilton LLP

*Tax partner and co-head of Independent Contractor Compliance Practice*

Richard J. Reibstein, Pepper Hamilton LLP

*Labor partner and co-head of Independent Contractor Compliance Practice*

Andrew J. Rudolph, Pepper Hamilton LLP

*Employee benefits partner and co-head of Independent Contractor Compliance Practice*

Register online at <http://www.regonline.com/Checkin.asp?EventId=869436>.

Contact Brian Dolan at [dolanb@pepperlaw.com](mailto:dolanb@pepperlaw.com) or 215.981.4568 with any questions.