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COLOMBO KITCHIN Legal news

ADDRESSING THE LEGAL NEEDS OF INDIVIDUALS AND BUSINESSES IN OUR COMMUNITY

Inherited IRAs, Bankruptcy, and Estate Planning

Author: Bradley D. Piner, Attorney at Law

The general purpose of the United States Bankruptcy Code (the "Code") is to assist in the resolution of situations where a person's debts and obligations exceed their assets or their ability to pay their creditors. However, there are also decisions made in the Code regarding what assets should be protected from the claims of creditors, such as a person's home or retirement accounts.

One source of "retirement" funds that many individuals have come to possess is an IRA inherited from a family member. In June 2014, the United States Supreme Court held in *Clark v. Rameker* that an inherited IRA failed to meet the criteria for a "retirement account" that warranted protection under the federal exemptions allowed in the Code. The Court's reasoning was that an inherited IRA lacks the characteristics of a traditional retirement account. For example, an individual cannot invest additional funds into an inherited IRA and can withdraw funds at any time for any purpose without penalty to the beneficiary.

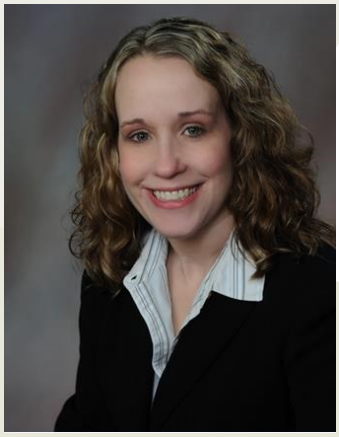
While this decision was a tremendous blow to debtors in some states, North Carolina was an exception. North Carolina General Statutes §1C-1601(a)(9) specifically includes inherited IRAs or similar accounts as exempt from the claims of creditors. Because the Code allows debtors to choose between either their federal or state exemptions when filing bankruptcy, North Carolina debtors can still protect those assets through bankruptcy. The potential trade-off is that there may be other assets that could be lost due to choosing the state exemptions as opposed to the federal exemptions.

However, the issue raises potential planning opportunities in the context of estate planning. If an individual has a significant IRA that would otherwise have beneficiaries scattered across different states, do those states have similar protections? If not, the solution could be the use of a specialized trust to serve as the beneficiary of the IRA. While the specific requirements of such a trust are beyond the scope of this article, a trust could be used in such a way as to protect some or all of the inherited IRA for the benefit of the beneficiary or beneficiaries.

These types of trusts require very detailed and specialized language, along with a thorough discussion of the tax and non-tax consequences of using a trust to serve as the beneficiary. A trust of this type is not for everyone and a careful and informed decision must be made after weighing all of the pros and cons in each particular case. If you believe your circumstances would warrant the use of a trust, we would be happy to discuss the issue with you.

This Edition's
FEATURED ATTORNEY

Tracy H. Stroud Named Partner



Colombo Kitchin Attorneys is proud to announce that Tracy H. Stroud has been named Partner. Tracy joined the firm in 2009. She practices in the areas of employment law, contract disputes and commercial litigation, estate and trust disputes, family law and real estate litigation.

Tracy graduated from Meredith College magna cum laude in 1994, receive her Masters degree from East Carolina University in 1999, and graduated with honors from Campbell University School of Law in 2009.

Can't file by April 18th? Use Free File to get a six-month extension. In a matter of minutes anyone, regardless of income, can use this free service to electronically request an automatic tax-filing extension on Form 4868. Filing this form gives you until October 17th to file a return.

Visit My Blog

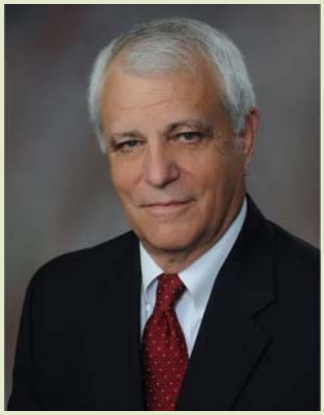
Please visit our website at www.ck-attorneys.com and look for the blog buttons on these profile pages: Tracy Stroud, Lee Allen, Brad Piner, Kevin Sayed and Charlotte-Anne Alexander.

Employee or Independent Contractor?

Author: W. Walt Kitchin, Attorney at Law

In an effort to avoid liability, wage withholding obligations, and compliance with labor laws, many companies have attempted to classify workers as independent contractors rather than employees. In 2015 the U.S. Department of Labor issued an Administrator's Interpretation in which it attempted to clarify the test for whether a worker is in fact an independent contractor or an employee of the entity by which it is paid. The Department of Labor now uses exclusively the economic realities test which sets out six factors to determine if a worker is economically dependent on the entity by which it is paid. These factors are: (a) Is the work an integral part of the employer's business? (b) Does the worker's managerial skill affect the worker's opportunity for profit or loss? (c) How does the worker's relative investment compare to the employer's investment? (d) Does the work performed require special skill and initiative? (e) Is the relationship between the employee and employer permanent or indefinite? (f) What is the nature and degree of employer's control?

For a number of years this last factor, *i.e.* the nature and degree of employer's control over the work, was the most analyzed factor to be considered. Under the new Interpretation this factor has no more weight than any of the other factors set out above.



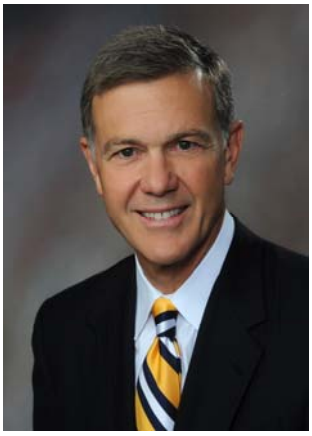
The Fair Labor Standards Act definition of "employ" includes "to suffer or to permit to work". This definition is in accordance with the philosophy of the Department of Labor that the term employment should be given the broadest definition possible to cover as many workers as possible. Employers should also be aware that employees are not permitted to waive employee status so that a mere agreement between the parties that the worker is an independent contractor is in no way determinative of their actual status.

The Department will look at and analyze each of the six factors with the idea that employers who misclassify workers are subject to enforcement actions. Therefore, employers should exercise care in consulting each and every factor in this interpretation when determining the status of an independent contractor.

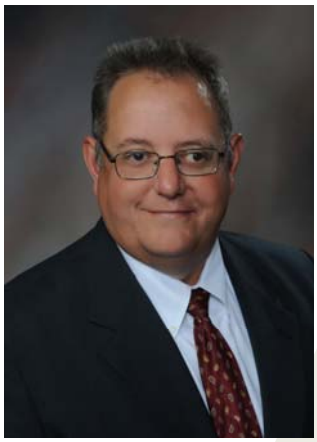
AWARD WINNING LAW FIRM

Michael A. Colombo and John B. Dunn, Jr. Named 2016 Best Lawyers

Colombo, Kitchin, Dunn, Ball & Porter, LLP was named by *U.S. News and World Report* as a Tier 1 **Best Law Firm** in Tax Law for the Raleigh Metro Area of North Carolina.



Michael A. Colombo was named in the practice area of Tax Law. Mike is a past president of the North Carolina Bar Association and founding partner of Colombo, Kitchin, Dunn, Ball & Porter, L.L.P. He is a North Carolina Board Certified Estate Planning and Probate Specialist, and also practices in the areas of business planning and taxation law.



John B.. Dunn, Jr., was named in the area of Elder Law. John has practiced in Greenville since 1992 and has extensive experience in elder law, estate planning, estate administration and guardianships. He is also the Public Administrator for Pitt County.

Only the top four percent of US lawyers are named by *The Best Lawyers in America*.

Firms included in the 2016 "Best Law Firms" list are recognized for professional excellence with persistently impressive ratings from clients and peers. Achieving a tiered ranking signals a unique combination of quality law practice and breadth of legal expertise.

Employer CORNER

Changes in Fair Labor Standards Act

Author: Tracy H. Stroud, Attorney at Law

The current salary level threshold for exemption is that an employee must be paid at not less than $455 per week or $23,660 annually to meet the salary level test under the FLSA. The new proposed salary threshold in proposed regulations for exemption is $970 per week or $50,440 annually.

Remember, however, to be exempt, an employee must meet all three tests, not just the salary level test.

The tests are: How employees are paid? (1) SALARY BASIS: Employee must be paid a pre-determined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed. (2) SALARY LEVEL: Currently this is $455/week or $23,660 per year; and (3) JOB DUTIES TEST: Each category of exemption – Executive, Administrative and Professional has different job duties as set forth in the regulations.

If this new salary level regulation goes into effect, any salaried "exempt" employees (i.e. currently ineligible for overtime pay) that make less than $970 per week will be reclassified as non-exempt and entitled to overtime when the final rule goes into effect. Also employers will be required to keep up with the DOL's record keeping requirements for these new non-exempt employees including keeping records in these employees for: (1) Hours worked each day; (2) Total hours worked each week; (3) Daily/weekly straight time earnings for the workweek; and (4) Overtime earnings for the workweek.

The impact, if this regulation is put into effect, is that more employees will be entitled to overtime. The DOL estimates almost 5 million employees will become non-exempt under the new regulations, which will result in more overtime claims and lawsuits and an increase in number of Department of Labor audits.

How can employers prepare? Determine which employees will possibly be re-classified; determine how many work hours is the employee currently working for the compensation paid; beware of "hidden overtime", meaning even if position is scheduled for less than 40 hours per week, are you confident that the employee is performing no duties outside working hours (e.g. answering emails, reading work materials, etc.), and install time tracking mechanism.

The comment period for these proposed rules ended on September 4, 2015. At this point, the Department of Labor will either: (1) Proceed with the proposed changes and issue a Final Rule, which means employers will likely have as little as 120 days to comply; (2) Issue a new or modified proposed rules, which will include a new comment period; OR (3) Take no action of the proposed rule.