

WHOSE EMPLOYEE IS IT ANYWAY?

Presented by

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The determination of the employer responsible for the provision of workers compensation benefits can be quite complex when the work arrangement goes beyond the traditional employer-employee relationship. Independent contractors, temporary agency arrangements, and professional leasing organizations are examples of alternate staffing options that can give rise to questions as to whether certain employment-related liabilities such as the workers compensation risk can be contractually transferred to another party. For example, most states statutorily require employers to provide workers compensation benefits to workers injured on the job. Can this responsibility be shifted to another party in a way the states will enforce? If so, is the benefit of exclusive remedy also transferred to that entity, thereby exposing your company to civil liability? Learn the answers to these and other questions when you sit on the national Supreme Court and adjudicate actual cases. This session will help you decide whether alternate staffing options might be a sound risk management strategy for your (or your client's) organization.

Tuesday, October 30, 1:30-3:00 p.m. and 3:30-5:00 p.m.



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James E. Pocius
Shareholder
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Mr. Pocius is a presenter for Tuesday's Workshop D, "Whose Employee Is It Anyway?" As a shareholder in the Scranton, Pennsylvania, office of Marshall, Dennehey, Warner, Coleman & Goggin and a member of the firm's workers compensation department, Mr. Pocius supervises the workers compensation attorneys in the firm's Scranton, Allentown, Williamsport, and Harrisburg offices. His practice is dedicated to the full-time litigation of workers compensation claims, federal black lung claims, and employers liability claims exclusively on behalf of insurance companies and self-insureds. His experience includes full file development and litigation in the United States District Court for Middle District of Pennsylvania, Court of Common Pleas, Third Circuit Court of Appeals, Federal Black Lung Administrative Law Judges, Workers Compensation Judges, and Appellate Courts in the Commonwealth of Pennsylvania.

Prior to joining Marshall, Dennehey, Warner, Coleman & Goggin, he was in private practice specializing in defense of civil litigation, workers compensation, and federal black lung. He was associate solicitor of the City of Scranton from 1988 until 1990. He was associate professor at Marywood College, teaching workers compensation in the ABA-approved legal program from 1987 until 1997. He has also served as an associate attorney with Lenahan & Dempsey, P.C., in Scranton; as a legal clerk to the Honorable James J. Walsh, Judge of the Court of Common Pleas of Lackawanna County; and as a member of the legal staff at Dollar Savings Bank in Pittsburgh.

In addition to numerous in-service presentations dealing with workers compensation and federal black lung issues for various employers, insurance companies, and self-insured administrators in the Scranton area, Mr. Pocius has addressed the Pennsylvania Bar Institute and the CPCU Society on several occasions. He has also been a speaker for the American Bar Association, the National Workers Compensation and Disability Conference, and the Lorman Business Institute. He wrote "Attorney's Fees and Penalties" and was coauthor of "Offsets under Act 57" for the Pennsylvania Bar Institute. His article, "Interaction between the Pennsylvania Workers Compensation Act and the Heart and Lung Act," was published in the *Pennsylvania Bar Association Quarterly* and "Subrogation in Workers Compensation" was published by the Pennsylvania Defense Institute. He was coauthor of "Analysis of the Federal Coal Mine Safety Act," written for International Risk Management Institute's *IRMI Workers Comp: Coverage, Laws, and Cost Containment*; "Defining the ADA," for the *Pennsylvanian* magazine, and "Litigation in Workers Compensation Claims," for the American Bar Association national magazine, *Compleat Lawyer*. Mr. Pocius is also responsible for multiple articles published in the Defense Digest on behalf of Marshall, Dennehey concerning various workers compensation issues.

He earned his juris doctor degree from the Dusquesne University School of Law in Pittsburgh in 1978, and his bachelor of science degree in pre-law from Pennsylvania State University in State College in 1974. He was selected for the Dusquesne Law Review, was a student representative from Dusquesne Law School to the American Bar Association, and was news editor for the law school magazine, *Jurist*.

He is a member of the American Bar Association and the bar associations of Pennsylvania and Lackawanna County, and the Pennsylvania Defense Institute.

Diedra M. Thompson
Senior Attorney, Intel Legal Team
Intel Corp.

Ms. Thompson is a presenter for Tuesday's Workshop D, "Whose Employee Is It Anyway?" She recently joined the Intel Legal Team of Intel Corporation, in Chandler, Arizona, as senior attorney. She was previously senior counsel, Capital Projects, for Mobile Business Resources Corporation, in Fairfax, Virginia. There, Ms. Thompson provided expert legal counsel to Capital Projects Management, Mobil Technology Company, and other Mobil attorneys on issues relating to capital construction projects and construction contracts worldwide. She was responsible for handling claims and contract interpretation issues, drafting and negotiating Mobil's construction documents, guiding Mobil's policies regarding allocating risks and assuming liabilities for capital projects, and providing training on contract administration and legal issues concerning construction.

Previously, she supported Mobil's Petrochemicals Division (worldwide) in operating numerous manufacturing facilities, constructing new manufacturing facilities, and directly selling raw materials worldwide. She also served Mobil in its General Commercial (Lubes) area supporting headquarters and field personnel in the United States and Canada operating Mobil's lubes business, and in its USM&R (Resale Districts & Lubes) area providing legal counsel to Mobil personnel operating motor fuel resale districts in New York, New Jersey, and Florida. Her first position with Mobil was in its Land Development Corporation, providing legal support to two MLDC regions responsible for mixed use land development projects under active development including operational issues (golf course and club, homeowner associations, municipal districts) and land acquisitions and divestitures.

She earned a juris doctor degree from the University of Denver in 1986, an M.P.A. degree from the University of Colorado in 1974, and a bachelor of science degree from the University of Oregon in 1968. She was admitted to the Virginia Bar Association in 1993 and the Colorado Bar Association in 1986.

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- A. Temporary agency workers
- B. Independent contractors
- C. Leased employees
- D. The rules of the game
 - 1. Common law analysis
 - 2. Registration of professional employer organizations

II. Common Law Analysis

- A. Generally courts rely on seven factors to determine the actual employer
 - 1. A person in the general employ of another can be transferred to another employer and can become the employee of the second employer
 - 2. Whether the transferred employee becomes an employee of the second employer depends on whether the first employer passes to the second employer not only the right to control the employee's work, but also his manner of performing it.
 - 3. It is enough to establish the employer/employee relationship if the employer has the right to control the employee's manner of performance of work. Regardless of whether the right is even exercised.

- 4. If a truck is leased with a driver there is a presumption that the driver remains in the employ of his original employer until there is evidence that the second employer assumed control over the manner of performing his work.
- 5. Facts that indicate that an employee remains in the original employer's service include:
 - a. Original employer's right to select the employee to be loaned and to discharge that person at any time
 - b. The loaned employee's possession of a skill or special training required by the work for the second employer, and employment at a daily or hourly rate for no definite period
- 6. The fact that the second employer designates the work to be done and where it is done, does not militate against the first employer-employee relationship
- 7. When the facts are undisputed the determination is a matter of law. If the facts are in dispute, the determination is one of fact.
- B. Case-by-case analysis with audience participation as the "National Court"
 - 1. *Accountemps v WCAB* (1988)
 - 2. *Wetzel v City of Altoona* (1991)

3. *Bacon v Tucker* (1989)
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- A. Definition
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 - 4. Management and Supervision
 - 5. Dismissal

Notes

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In these changing business times, it is sometimes very difficult to discern who the real employer is with regard to the employee/employer relationship. Companies have to be more flexible as the traditional employer/employee relationship is being eroded by other relationships. In the traditional employer/employee relationship an employer hires an employee, supervises the employee and pays the employee. Ideally, that employee would work for the same employer for the employee's entire lifetime and then retire.

In today's business world, this type of relationship largely no longer exists. Most businesses must be "lean and mean" in order to compete on a global scale. As a result of their changing labor needs, the employer/employee relationship has also changed. Employer's are beginning to use temporary agency workers, independent contractors and, in some instances leased employees to enhance their competitive advantage. We will discuss each of these relationships in order to determine what relationship constitutes an employee/employer relationship. In order to determine whose employee it is, we must discuss the rules of the game. Thirty five states continue to require a common law analysis, while fifteen states either license or require registration of professional employer organizations.

SECTION 1

THE COMMON LAW

Common law has been in development since the signing of the Magna Carta in England under the hand of King John. Thirty five states use a common law analysis to determine the employer/employee relationship. Since 1953 the Commonwealth Court in Pennsylvania has been wrestling with the problem of temporary employees. The concept of workers compensation is governed by the employer/employee relationship. This relationship is complicated if the employee is furnished by an agency or is only a temporary em-

ployee. The employer/employee relationship which exists is one of law but based on the facts of each case. *PMA v. W.C.A.B.*, 418 A.2d 780 (1980). When an employee is furnished by one entity to another, the situation is one of a "borrowed employee". *Shreiner Trucking Company v. W.C.A.B.*, A.2d 1337 (1986). In *Shreiner*, the Court set forth seven factors which are to be considered in determining which party is the employer. The factors were originally set forth in the case of *Daily Express, Inc. v. W.C.A.B.*, 406 A.2d 600 (1979). In *Daily*, the Court actually summarized factors set forth in the case of *Mature v. Angelo*, 97 A.2d 59(1953). The factors upon which the Commonwealth Court relied are as follows:

- 1. A person in the general employ of another can be transferred to another employer and become the employee of the second employer.**
- 2. Whether or not the transferred employee becomes the employee of the second employer depends on whether the first employer passes to the second employer not only the right to control the employees work; but also his manner of performing it.**
- 3. It is enough to establish the employer/employee relationship if the employer has the right to control the employees manner of performance of work regardless of whether the right is ever exercised.**
- 4. Where one is engaged in the business of renting trucks and furnishes a driver as part of the hiring of the truck, there is a presumption that the driver remains in the employ of his original employer until there is evidence that the second employer, in fact, assumes control over the employee's manner of performing his work.**

5. **Facts which indicate that an employee remains in the original employer's service include:**
 - a. **Original employer's right to select the employee to be loaned and to discharge that person at anytime and send another person in this place.**
 - b. **The loaned employee's possession of a skill or special training required by the work for the second employer, and employment at a daily or hourly rate for no definite period.**
6. **The fact that the second employer designates the work to be done and where it is done, does not militate against the first employer/employee relationship.**
7. **When the facts are undisputed, the determination of who is the employee's employer is a matter of law. If the facts are disputed, the determination is one of fact.**

As you can see by the seven factors listed in this Commonwealth Court decision, each case must be analyzed on its separate facts. Further, each case can be scrutinized by the Court since the Court originally indicated that the employer/employee relationship is a matter of law.

These seven factors would largely be used to analyze any employer/employee relationship in the thirty five states which use the common law.

The only way to analyze this gray area of workers' compensation law is to look at some of the leading cases.

In 1988, the Pennsylvania Court decided *Accountemps v. W.C.A.B.*, 548 A.2d 703 (1988). Accountemps was an agency which provided temporary accounting help to its clients. The client would call the agency and give the specifications of the job for which it needed temporary help. Accountemps would then supply the individual it believed to be the best suited for the particular job. The individual was contacted by Accountemps and had the option of refusing the job. Accountemps set the hours, determined the salary to be paid and paid the salary.

Ms. Myers attempted a temporary job assignment to perform accounting work for the Spectrum Arena. She began the assignment on 10/13/82. On that day she was told a specific job she was to do and was instructed to see Carol (a Spectrum employee) if she had any questions.

On 10/29/82 Myers slipped in the Spectrum parking lot and broke her wrist. Thereafter, she was unable to work. Both the Spectrum and Accountemps contested that either was the responsible employer.

The Commonwealth Court relied on the seven factors set forth in *Shreiner*. The Court indicated that Myers was already in possession of a "special skill or training required". The Court went on the note that Accountemps tested their employees to determine if they were capable of doing accounting work before accepting them. While Myers was told by the Spectrum what accounting system was used, the Spectrum did not have to train her in accounting skills. Accountemps also selected her for the temporary job, paid her salary and determined what she would be paid. Therefore, based on these factors, the Commonwealth Court indicated that Accountemps was the properly designated employer.

In *Wetzel v. City of Altoona*, 618 A.2d 1219 (1991), the Commonwealth Court had to determine whether or not Wetzel was an employee of the City of Altoona. Wetzel was a participant in the Summer Youth Employment Program. This program was funded by the Federal Comprehensive Employee Training Act. The area school district served as the program administrator and Wetzel was referred to a City highway crew which was directed by a city employee.

A work cite agreement between the school district and the City identified the City as the employing agency. According to the agreement the employing agency agreed to provide proper and adequate supervision to the participant, appropriate jobs for youth with instruction in the relevant tasks and a safe and healthy work environment.

Wetzel was killed in the course of his employment when a City employee backed into him with a piece of earthmoving equipment. All of the agencies were sued civilly and each agency raised the immunity defense under the Pennsylvania Workers' Compensation Act. An employer is immune to civil liability under the Workers' Compensation Act. However, that protection is

exclusive to the employer. (Section 303 of the Act).

In this case, the Court noted that there was no standard approach or formula for the determination of the employer/employee relationship. The Court went on to determine that “the most important factor in determining the existence of an employer/employee relationship is evidence of actual control or the right to control the work to be done and the manner of its performance”.

The Court mentioned *PMA Insurance v. W.C.A.B.*, A.2d 780 (1979). In that case, a CETA employee assigned by the County of York to a project operated by the Community Progress Council was injured on the job. The Court determined that the County rather than the Council had employed the injured worker and reasoned that the Federal Government provided funds to the County to pay for workers’ compensation coverage for persons injured under the CETA Program. Because the County, under its contract with the Council, only transferred funds to the Council for administrative costs and retained control of amounts earmarked for wages and payment of workers’ compensation insurance premiums, the County remained the employer at the time of the injury. The Court noted that the County still had control over funding and that this control determined the identity of the employer. Thus, the Court established a “prime sponsor” test. However, in 1989, the same Court limited this application in *Bacon v. Tucker*, 564 A.2d 276 (1989). In *Bacon* the Court reaffirmed that the key element in determining the existence of an employer/employee relationship is control of the work performed. In *Bacon*, a participant in a summer youth employment program administered by Delaware County was assigned to work as a truck driver’s helper for the City of Chester. The employee was injured on the job and filed a negligence action against the truck driver and the City of Chester. Both defendant’s filed Motions for Summary Judgement alleging that they were the statutory employer. On Appeal, the Commonwealth Court held that because the City of Chester was the injured worker’s employer, it was immune from suit under the Act.

The Court went on to note that they essentially overruled the *PMA* decision. The Court stated that it previously used the “prime sponsor” test to govern the determination of employer status for purposes under the Act. Under the prime sponsor test, as previously noted, an employer

was identified as the agency which received and administered federally provided funds for the employee’s wages and payment of workers’ compensation insurance premiums. Although Delaware County occupied that role in *Bacon*, the Court nevertheless held that this fact was not dispositive. The Court then concluded that the agency with the actual control over the employee was the actual employer.

In *Wetzel*, the Court noted that control of the work to be performed and not control of the funding best determines the existence of the employer/employee relationship. Since the City of Altoona determined that hours and location of the work, and established the governing use of hard hats and vests and safety requirements around the construction equipment, the City had actual control of the decedent’s work.

The next case deals with the trucking industry. These cases are usually complex but the analysis must remain the same. In *Friedline Trucking v. W.C.A.13.*, 616 A.2d 728 (1991) the Court was presented with a complicated fact situation. In 1985 the claimant was injured while driving a truck owned by Conn. At the time of the accident, the truck was leased by Conn to Friedline and operated under Friedline’s PUC permit. The claimant filed a claim petition in 1987 naming Conn as his employer. Conn joined Friedline as an additional defendant. The employer had to be determined. The Court went back to the seven principals enunciated in the *Mature* (supra) case. The Court indicated that there a presumption that the claimant remained an employee of Conn unless there was evidence that Friedline assumed control over the claimant’s manner of performing his work. In order to determine whether or not such control was exercised by Friedline, the Court analyzed the entire record. The Court first looked to the lease between the parties. The lease indicated that Conn would furnish and provide all of the equipment, maintenance for the equipment and expenses for any equipment. Public liability and property damage insurance was also carried by Conn.

The Court noted that the Claimant was paid by Conn. The lease did not indicate whether or not there was an intent for the claimant to be an employee of Friedline. The Court then analyzed the actual behavior of the parties. The claimant testified that he worked for Conn before Conn leased the trucks. The claimant indicated he considered Conn to be his employer. The claimant testified that he was authorized by Conn to call

Friedline directly on occasions to obtain additional loads. According to the Claimant, Friedline never specifically ordered the claimant personally to pick up a load at a certain time and the claimant testified that the only relationship he had with Friedline was because Conn's trucks were leased to Friedline. JamesConn also testified that he considered himself to be the claimant's employer. Conn further testified that although Friedline controlled where the loads were to be picked up and dropped off, Conn provided this information to the drivers and permitted his drivers to decide which load they wanted to haul.

Friedline testified that Conn hired the drivers and paid the drivers directly and that he considered the drivers to be Conn's employees. Friedline further stated that he would designate where the load was to be picked up and where it was to be delivered. The trucks also carried the Friedline label. Under the circumstances, the Court noted that the presence of a party's name on a commercial vehicle raises a rebuttable presumption that the vehicle is owned by that party and that the driver of the vehicle was an employee of the party acting within the scope of his employment. *Navajo Freightlines v. W.C.A.B.*, 338 A.2d 766 (1975). However, in the present case, the Court noted that after reviewing all of the evidence the presumption that Conn was the employer was not rebutted. The Court exercised a balancing test and found more factors pointed to Conn's status as an employer.

The next case that we should examine is the case of *JFC Temps, Inc. v. W.C.A.B.* 665 A.2d 30 (1995). In this case, the Supreme Court of Pennsylvania issued a ruling on the borrowed employee topic. JFC Temps hired the claimant and provided him with job assignments. This included a long term assignment with the second defendant as a tractor trailer driver. The claimant was injured while exiting the second defendant's truck. Due to the injury, his leg had to be amputated. Both JFC Temps and G&B Trucking denied that they were the employer of the claimant. The Supreme Court again relied on *Mature* (supra). The Court noted that the primary test for determining whether a servant furnished by one person to another becomes the employee of the person to whom he is loaned is "whether he passes under the latter's right of control with regard not only to the work to be done, but also to the manner of performing it." Other factors which may be relevant include the right to select and discharge the employee and the skill or expertise required for the performance of the work. The payment of

wages may be considered, but is not a determinative factor. In this case, JFC, after reviewing the claimant's qualifications assigned the claimant to G&B as a tractor trailer driver. G&B, the second employer, had no control over which driver appeared to perform the work. However, after the claimant reported, G&B informed the claimant of his work hours, what truck to use and where to go. Each day G&B would give the claimant documents for freight, the bill of lading and the keys to a tractor trailer. After hauling a load, the claimant would report back to G&B. The claimant's time slips were completed and signed by G&B. However, JFC (the temporary employer) paid the claimant's salary.

It was G&B's decision whether the claimant's work was satisfactory and, if unsatisfied, G&B could request a replacement for the Claimant. However, G&B could not fire the claimant. After a lengthy discussion of the previous case law, the Court recognized that claimant possessed the requisite skill to perform trucking work and referred to the *Accountemps* case.

After reviewing all of the factors, the Court indicated that *the right to control the performance of the work is the overriding factor*. The Court went on to find that G&B had the right to control the manner of performance of the claimant's work and therefore G&B was responsible for payment of the workers' compensation benefits. The Court also noted that the *Accountemps* case was limited to that factual scenario.

Thus, the Pennsylvania Supreme Court, and most of the other states, have determined that the law governing borrowed employees relies chiefly on who controls the day to day operations with regard to that employee. It appears that the Court's have clearly sent a message that any employer who controlled the work of a temporary employee would be considered responsible for the workers' compensation benefits.

In Pennsylvania, the Workers Compensation Appeal Board relied on these pronouncements of the Supreme Court when it decided a case in 1997. *Jerry v. American Thermoplastic*, 11 PAW-CLR 1175 (1997) the Board was presented with an interesting question. The claimant filed two claim petitions alleging that she was injured. On one claim petition she listed a temporary employer agency as the defendant while the other listed American Thermoplastic. The Board noted that the claimant was interviewed and hired by the temporary agency and could only be termi-

nated or discharged by the temporary agency. Further, the temporary agency provided workers' compensation insurance for this employee. However, the claimant received her daily work assignments from American and American controlled the manner in which the claimant performed her work. Claimant also testified that American directed her work and how to perform her work. The Board held that American was the employer since American controlled the performance of the claimant's work. The Board stated: "Since this is the overriding factor to be considered, American is the employer". It is interesting to note that the Board did not mention how long the Claimant was employed by American Thermoplastic not does it indicate whether or not the claimant had any type of special skill. It appears that the Board might now be relying on one factor as opposed to a multitude of factors in determining the legal status of the employer/employee relationship.

This thinking carries over to all of the other states. The overriding factor in a common law state is which employer controls the day to day work of the employee and how that work is done. Other factors may still be considered but this factor is now the most important.

SUMMARY

In common law states, there is a seven pronged test to determine whether or not a borrowed employee becomes the employee of the second employer. This test has been evolving since the 1950's. However, in the 1990's it appears that if the second employer controls the work of the employee or has the right to exercise that control the second employer will be considered the employer for workers' compensation benefits and statutory immunity.

INDEPENDENT CONTRACTORS OR EMPLOYEES?

An analysis as to whether or not a worker is an employee or an independent contractor also deals principally on who exercises control. This analysis may not be as complex as the analysis of the "borrowed" employee. The relevant criteria for distinguishing between an employee and independent contractor in a common law state is demonstrated by the Pennsylvania Supreme Court. *Hammermill Paper Company v. Rust Engi-*

neering Co., 243 A.2d 389 (1968) and *J. Miller Company v. Mixer*, 277 A.2d 867 (1971). The Courts have explained that there was no hard and fast definition for the determination of whether any given relationship is one of independent contractor or that of employer/employee. However, we again have guidelines to be used in making such a determination. Some of the principal guidelines which common law states use to determine this relationship are as follows:

1. **Control of the manner in which work is to be done;**
2. **responsibility for result only;**
3. **terms of agreement between the parties;**
4. **the nature of the worker occupation;**
5. **skill required for performance;**
6. **whether one employed is engaged in a distinct occupation or business;**
7. **which party supplies the tools;**
8. **whether payment is by the time or by the job;**
9. **whether work is part of regular business of the employer, and also the right of employer to terminate the employment at any time.**

The Courts have stated that these guidelines are not binding in nature and whether some or all of them exist in any given situation is not absolutely controlling as to the outcome. Each case must be determined on its own facts.

We must again analyze some of the case law to see how these principals work.

An interesting application of the independent contractor theory was tested in *Genie Trucking Line, Inc. v. American Home Assurance Company*, 524 A.2d 966 (1987). Genie Trucking lines attempted to buy workers' compensation insurance at a reduced rate by claiming that the drivers of the trucks were independent contractors. Further, the truck contractors has control over the operation of the leased vehicles. The insurance company refused to list the drivers and truck contractors as independent contractors and included them in the amount of premium. Genie

paid the workers compensation insurance premium and then sued the insurance company to recover what they claim to be an overpayment. The lease, which was provided by Genie indicated that the truckers were independent contractors and that the terms of the lease should be strictly applied. However, the Court decided that the lease could not be considered in a vacuum. Instead, the Court looked to all of the evidence which was produced a trial. Genie required the truck contractors and drivers to complete forms pertaining to their driving ability and former experience and could except or reject them on the basis of this information. Genie also tested the drivers and was able to terminate a drivers employment for enumerated reasons. Further, drivers were not allowed to drive for another carrier without Genie's prior approval and were required to carry documents identifying Genie as the carrier. Occasionally, Genie advanced funds to drivers to cover trip expenses and on every trip, Genie required the drivers to report to it. The vehicles leased by Genie carried permanently affixed decals bearing Genie's name. Finally, there was no evidence that the employees of the trucking contract had been covered by any other valid workers' compensation insurance. After weighing these factors, the Commonwealth Court held that the trucking contractors and drivers were employees of Genie. This case proves that a Genie cannot wave a magic wand and change employees into independent contractors.

Some recent decisions by the Workers' Compensation Appeal Board in Pennsylvania showed that this analysis is still approved and is used in common law states.

In *Mazzoni v. Roadway Package*, No. A95-1 148 (8/28/97), 12 PAWCLR 1041 (1997) the claimant was injured while performing package shipping work for the defendant. The claimant testified that when he went to work with Roadway Package he had to sign an agreement for leased equipment and independent contractor services. He testified he was told to sign the various documents without having the documents explained to him. He explained that "For me to get on the road they said I had to have insurance. So I wanted to work, I wanted a job, so I signed them." The claimant then testified that Roadway automatically took out deductions for insurance, work accident insurance, physical deadhead insurance, and escrowed monies for damaged packages and uniform rental. Roadway deducted

insurance premiums from everyone at work. Roadway contributed nothing to the claimant's insurance premiums. The claimant also stated that he paid the licensing fee, taxes and repairs and maintenance for the truck. The truck had Roadway logos on the front, back and both sides of it. The claimant believed that Roadway paid the insurance for the truck. Claimant also testified that he was required to make an initial payment and to lease his truck from a company which was referred by Roadway. Roadway also referred him to the company that would provide repairs and maintenance for the truck. Roadway had spare trucks available if the claimant's truck was unavailable.

Roadway then assigned the claimant to his daily route based on three zip code areas. All of the packages handled by the claimant were received from and returned to his Roadway station.

He was required by Roadway to rent his uniform from Roadway. He was required by Roadway to wear that uniform at all times and he was required by Roadway to appear clean shaven and well groomed. He also had to submit to a pre-employment drug test, driving test and Roadway procedure test. The claimant could subcontract his work, but only with Roadway employees according to Roadway specifications. In addition, Roadway conducted monthly meetings to discuss the loading of the trucks, delivery, personnel matters, etc.

On these facts the Workers' Compensation Appeal Board ruled that the defendant regulated and controlled the specific manner in which the claimant's work was done. Because of that regulation he was an employee. The Board specifically noted that the claimant's clothing, appearance, geographical route area and pick up times were all controlled by our Roadway. Further, all of the tools of the trade including the claimant uniform, truck, customer supplies, computer scanner and packages were all provided through Roadway. On balance, the claimant was found to be an employee.

In *Kerstetter v. The Patriot News*, A96-0520, 12 PAWCLR 1032 (1997), the Board was called upon to decide whether a newspaper carrier was an employee of the defendant newspaper. The claimant began working for the newspaper in 1991. The claimant suffered a disabling injury in the nature of two broken legs, a broken wrist and a punctured lung when she was involved in a

motor vehicle accident while in the course and scope of her work. The claimant did not have specific work hours or a specific schedule as to when to deliver the newspapers. The defendant never provided the claimant with benefits nor was there any policy restricting delivery of competitors' newspapers. The claimant was responsible to find a substitute if she could not deliver papers but was not required to inform the newspaper of the substitution. Additionally, the claimant could refuse to accept new additions to her territory. The defendant did not withhold any taxes, social security payments or other payroll deductions from the claimant's profit checks.

The carriers were responsible for any damage that occurred to a premises on which they were making a delivery and the newspaper had no control over that situation. Further, the carriers did not perform any work at the premises of the Patriot News nor did they report to any supervisor. The claimant actually bought the paper from the company and the customers paid the carrier for the newspaper. The claimant actually earned money from the difference in profits between the selling price to the customer and the wholesale price from the paper.

The Workers' compensation Appeal Board, after reviewing these factors, agreed that the newspaper carrier was an independent contractor.

SUMMARY

It is clear that a balancing test, in common law states, is applied in each independent contractor case and each unique case will be decided on its own merits. However, it is important to note that the more control that is exerted by the potential employer, the greater the chance will be that an employee/employer relationship will be found. We must also note that the wage and hour division of the Department of Labor still utilizes a twenty point common law checklist to determine the status of an employment relationship. Under this checklist, the right to control, whether exercised or not, has been the prime indicator of an employment arrangement. However, as we have seen, the Courts appear to weigh more heavily on which of the coemployers actually is in daily direction and control of the work place for final determination of employer status.

PROFESSIONAL EMPLOYER ORGANIZATIONS

We must now attempt to determine how a professional employer organization fits into this backdrop of common law control. A professional employer organization or PEO is an organization that leases employees to an employer in a long term relationship. The definition by Florida statute is "Employee leasing means an arrangement whereby a leasing company assigns its employees to a client and allocates the direction of and control over the leased employees between leasing companies and a client." The professional employer organization is different than a temporary agency. The relationship with a PEO is a contractual relationship between the leasing company and their client companies.

The contracts vary widely but the PEO usually assumes the responsibility as an employer for specific purposes only on a long term basis. Obviously, what these specific purposes are, must be defined in a contract. The contracts are not standard. Some allow retroactive cancellation, some include indemnification and hold harmless clauses in favor of the PEO and specifically cite the business owner as the responsible party for discrimination type claims. Thus, the original company remains the employer of record for a lot of issues. The PEO takes only an advisory position.

It would be up to the leasing employer to make sure of what "specific purposes" are included for the PEO. This could include payment of payroll and taxes, providing workers' compensation insurance, and employee benefits. There may also be some limited human resource support.

In most cases, the client company remains in charge of the daily operations and remains charged with implementation of any work place safety or daily employment issues. Some problems have developed with regard to this arrangement since some PEO's outsource payroll as well as other administrative services offer little or no assistance in the areas of wage and hour compliance. (payroll, overtime and overtime exempt status) Further, they usually do not offer consulting in the area of defining employees against independent contractors.

There is also a problem which has developed with regard to the paying of wages and related payroll taxes without regard to reimbursement by the business owner. Under a Florida Regulation (468.529) 1 the PEO is responsible for the payment of wages and taxes including state unemployment tax. However, there was also a Federal Court ruling *USA v. Imrc Garami*, indicating that a business owner may remain responsible if determined to be the actual employer of the leased workers with regard to federal taxes and penalties if the taxes are not remitted properly. Further, as we will recall, the common law test would be decided on who is the source of the wage, the method of payment, the rate of pay and who controls the employee. Thus, there is a strong argument that the original employer would still be responsible for these taxes if not paid.

The right of direction and control is usually found in the agreement for services contract between the client and the PEO. In Florida, the term "co-employment" best fits the situation. The responsibilities are shared between the client and the PEO with the PEO taking the "administrative employer" role and the client remaining in charge of the product or service of the client company. However, as previously noted, the wage and hour division of the Department of Labor still utilizes the common law checklist. Thus, the employer is probably still ultimately responsible if there is any type of violation. The PEO would provide workers' compensation coverage and would be the employer of record for payroll and payroll taxes. However, federal agencies are still relying on the common law rule. Thus, if there is an OSHA problem the government would look to the client company for safety regulations and fines for a noncompliance.

SUMMARY

The PEO organization is an organization which undertakes to assume some of the responsibilities of the original employer. These duties must be defined by contractor statutes and usually are used in a long term relationship. There are some advantages to this relationship. An employer with a small number of employees would be able to defer some of its human resources problems to a PEO which may have more experience. In addition, the PEO, through its size, may be able to obtain advantageous rates for workers compensation insurance, health plans, etc. which would be out of reach of the smaller employer. By outsourcing payroll, benefits, etc, a small employer

would effectively gain more time to run a business.

POTENTIAL PROBLEMS WITH USE OF A PEO

While the deferment of possible liability and human resource problems appears to be a "golden fleece" it is entirely possible, that if the contract is not worded correctly, that the employer may "get fleeced".

We must first look to problems with regard to workers' compensation. As we have previously noted, in common law states, the right to control the employees behavior, is one of the most important factors to establish who is the real employer. The fact that the employee is paid by any particular entity is not in itself conclusive.

In Florida, the state with the most leased employees, the legislature indicated that employer immunity will rest with the original employer. That employer shall be liable for and shall secure the payment of all workers compensation for any employees borrowed by a PEO. The only exception is when workers' compensation insurance has been secured by the PEO.

From this legislation, it is easily discerned that an employer cannot shift its workers compensation responsibility to a PEO. A PEO may have the power to buy insurance for the employees and the employer may be able to get a better rate through the use of a PEO, but ultimately, the liability with regard to those employees rests with the original employer.

This raises an interesting question. If the PEO is designated by contract to obtain workers' compensation insurance and does not in this situation, the original employer can be "lulled" into thinking it has coverage and then finding out later that it does not. This is a very serious situation and any contract with the PEO should include copies of the insurance policies that the PEO has issued with regard to all of the leased employees.

Further, most contracts do not include coverage for any non reported workers. If this is the case, what happens when a new employee is hired or an old employee is fired. This type of control rests with the original employer and not the PEO. An employer must make sure, through contract provisions, that a new employee would be auto-

matically picked up under the workers compensation policy. If not, or if there is a waiting period, the original employer would be responsible for any injuries which happen while the employee was not covered. Further, if the employer elects to provide or maintain his own workers compensation coverage, then does that protection extend to the PEO with regard to an injured worker?

Another problem occurs when a PEO wishes to write the workers compensation insurance. Typically, this insurance is written on the basis of a full payroll. Usually, an owner of the company, cannot be considered under workers' compensation insurance unless it is a corporation. However, if the owners salary is included in the determination of the premium for workers compensation to a PEO, the owner is actually paying extra premium and not getting any coverage in return. Further, if there is some question with regard to independent contractor and employee, and the PEO has not bought coverage with regard to these questioned employees, then the original employer would again be exposed to litigation and liability without having the opportunity to purchase insurance coverage.

SUMMARY

With regard to the insurance coverage and common law problems, any contracts signed with a PEO must be very detailed and the calculations must be very detailed to determine what each employer would pay to a PEO.

UNCLEAR STATE LAWS

As indicated, there are fifteen states which recognize PEO's. Some require registration and some do not while Florida is the only state which grants potential immunity to a PEO if it obtains workers compensation coverage. As such, no owner can rely on transferring liability for its human resource problems and workers compensation problems by using a PEO. At best, a PEO may be able to efficiently take over some administrative functions but really cannot take over liability. Further, by using a PEO, an employer may give up control which would actually cause more problems in the long run. By relying on outsourcing, issues such as safety, maybe "swept under the rug". Later on, if there is any type of violation with regard to federal or state laws, the employer would still be ultimately responsible.

HUMAN RESOURCE PROBLEMS

As previously noted there could be some human resource problems.

With regard to health and employee benefit programs, the advantage of a PEO is its large buying power. A PEO with thousands of employees can offer more cost effective benefits than a small employer. This author does not profess to know all of the federal rules but there could be problems with regard to small employers and PEO's. If an employer has less than twenty employees the employer is not responsible for problems such as cobra nor would the employer have to worry about the ADA or the family medical leave act. However, if the PEO is considered the employer, then, with thousands of employees, each separate employer maybe responsible under these federal programs. These are very complicated questions which would have to be spelled out in the contract agreement. The FMLA does not apply to any employers which have less than fifty workers but would apply, in theory, to the PEO. Thus, for smaller employers, a PEO may actually add liability where none existed before.

Finally, I would just like to mention that with regard to federal wages and administration taxes, it is still the employers responsibility to pay wages, pay taxes and collect those taxes for the government. The employer is required to collect and remit federal income tax from his employees and he must remit promptly and correctly or be subject to financial penalties or jail. He must determine what is included under the definition of "wages" and he must understand the definition of overtime and who is eligible and who is exempt from overtime.

For any of those areas, if the PEO misclassifies or miscalculates, it will be the original employer who is responsible. Remember that the Department of Labor still uses the common law definition.

SUMMARY

While there may be some advantages to a professional employer organization, such as reduced workers compensation payments and reduced costs for health plan and potential human resources help, it also seems that there are several significant disadvantages such as continuing re-

sponsibility for workers compensation liability, increased liability for any independent contractors that may be considered a worker, increased liability under federal employee programs and potential loss of trust from the employee work

force. Each employer must very carefully consider any PEO relationship and make sure that the contract with the PEO is clear and explicit with regard to the PEO's responsibilities.

TECHNIQUES TO MANAGE THE EMPLOYMENT RELATIONSHIP

*Diedra M. Thompson
Intel Corp.*

A. Introduction and Setting

This presentation will focus on how to distinguish between being a “team leader” vs. an “employer” when a situation arises that requires a team of people from different organizations to work together to accomplish a single objective. For purposes of demonstration, this presentation will use the structure of a capital project where the project team consists of employees of the owner and employees of other firms (consulting, architecture, engineering, temporary employment agencies) working together to achieve completion of a construction project.

The owner wants to build a manufacturing plant, a capital project. The owner is not in the capital project development business but still needs to improve or enlarge its manufacturing capacity from time to time. The owner employs operating and maintenance personnel, but they do not have expertise in construction-related skills such as Primavera scheduling, construction cost accounting and forecasting, handling change orders and the other volumes of documents that are associated with a construction project. Therefore, the owner needs to acquire those skills for the life of the project. Once the project is complete, the owner’s need for this expertise will evaporate until the next capital project.

The owner will put together a project team depicted on an organization chart. Some boxes on the organization chart will be filled with owner’s personnel, but there will still be boxes to fill. The owner may fill those boxes, acquire this expertise it needs on a temporary basis, by (1) hiring additional employees that have the expertise and then firing them when the project is over, (2) engaging individuals on an “independent contractor” basis and hope they really do pay their taxes and insurance premiums, or (3) enter into a contract for services with firms

that can provide persons with the required expertise to the owner.

Intel uses the third option. We enter into a contract for services with architecture, engineering, and consulting firms (referred to as a “Supplier”) that employ people with the expertise needed by the owner on a temporary basis and ask the supplier to assign their employees that can supply the services to an Intel Project Team. We only do this when the contract strategy for a particular project is multi-prime; that is, where Intel engages the trade contractors directly rather than using the services of a General Contractor.

B. Contract for Services

Clauses in the contract for services include (some sample clauses provided):

1. Independent Contractor.

Supplier’s relationship to Company is that of an independent contractor and nothing in this contract may be construed as creating any other relationship between Company and Supplier or between Company and Supplier’s subcontractors, agents, or employees. Further, nothing in this contract may be construed as creating the relationship of employer and employee between the parties, or between Company and Supplier’s subcontractors, agents or employees. Supplier acknowledges and agrees that Supplier and Supplier’s employees or agents will not be entitled to any of the benefits under any employee benefit plan of Company or its affiliates (“Benefit Plan”), and Supplier explicitly agrees that the terms of this contract exclude participation by Supplier employees and agents in any Benefit Plan. Neither Supplier nor any Supplier employees or agents are required or per-

mitted to make contributions (including but not limited to contributions by salary deduction agreements) to any Benefit Plan, and no contributions are made or required to be made for Supplier's benefit or for the benefit of Supplier employees or agents. Supplier further agrees that Supplier employees or agents do not accrue any benefits under any Benefit Plan and that services rendered under this contract do not give rise to any claim for benefits under any Benefit Plan. Supplier waives any right Supplier employees or agents might otherwise be considered to have to participate in any Benefit Plan. Nor will any of Supplier agents or employees be considered an employee of Company for purposes of any tax or contribution levied by an foreign or U.S. federal, state, or local government.

2. Supplier Employees.

Supplier represents and warrants that all persons assigned by Supplier to perform contracted services for Company under this contract are employees of Supplier. If an individual is stated to be an independent contractor, such person must be an independent contractor of Supplier. Supplier shall file all required returns and reports, withhold and pay all required federal, state and local wage or employment-related taxes, including but not limited to income taxes, social security taxes, unemployment taxes, and taxes measured by gross income or gross receipts, with respect to the amounts paid such Supplier employee or independent contractor in connection with their performance of contracted services. Supplier agrees to comply with all laws, rules, and regulations applicable to Supplier's responsibilities to its employees, independent contractors, or agents.

3. Reimbursement; Wage or Tax Contest.

Supplier agrees to reimburse Company for any wage, employment-related, or other tax not so withheld or remitted and for any costs and expenses, including reasonable attorneys fees, penalties, and interest, that Company may incur by reason of Supplier's failure to comply

with its obligations hereunder. Supplier shall join with Company, at Supplier's sole expense, in contesting any wage, employment-related, or other tax sought to be imposed by an federal, state, or local authority in connection with amounts paid by Supplier to individuals for their performance of contracted services under this contract and sought to be collected from Company. Supplier shall reimburse Company if, upon final appeal, Company is found liable for any wage, employment-related, or other tax, assessment, penalty, or interest, as well as for reasonable attorneys' fees and any other costs or expenses that Company may incur.

4. Description of the Project.

Include basic information such as type of project, location, anticipated duration, and objectives.

5. Description of Services.

Provide a detailed description of the services and skills required. Include the desired level of education and experience, the tasks and services to be performed, the kind and frequency of meetings to be attended, the kind and frequency of reports or documents to be delivered.

6. On-Site Supervision.

Require the Supplier to designate an on-site supervisor that all of Supplier's employees will report to. Describe or list the duties of the Supplier's on-site supervisor: meet with Company's designated representative at least weekly to plan and schedule Supplier's work, hold periodic "staff" meetings for all of Supplier's employees, attend "project information" meetings, and serve as the liaison between Company and Supplier.

7. Identify Training and Security Requirements.

Identify training, access, parking, and security requirements and clearly distinguish between what the Company will provide and what the Supplier is to provide. At Intel, we do not train the Supplier's employees or provide skill devel-

opment opportunities. However, we do provide training on site safety procedures, emergency procedures, and require identification badges for purposes of access for example.

8. Hosting Obligations.

In order to pull this group of people together and have them function as a team, their morale must be considered. It is impossible to have a highly efficient team if there is a distinct and constant division among the members. Therefore, Intel asks Suppliers to co-host various team events that their employees, as team members, should be invited to participate in.

C. Training Before and During the Project

Now that the contract for services with the Supplier is executed and the people from the Supplier are scheduled to show up at the job-site, what do we do next?

Before the Supplier's employees even show up at the job-site, we aggressively train Intel personnel on how to walk that line between being a "team leader" and an "employer".

We distinguish between these roles as much as possible by presenting "Management Do's and Don'ts" and presenting "Situations with Options". Topics include selection, compensation, communications, performance and discipline, recognition and rewards, and social events. Some examples from each follow, first are examples of the Do's and Don'ts.

1. Selection.

Intel does not "hire" any of Supplier's individual employees.

- **Do's:**

1. OK to set minimum requirements such as drug testing and criminal investigation (include in the contract for services).
2. OK to request that an individual not be considered based on prior

history of failure to perform or misconduct.

3. For a position with critical responsibilities, OK to define essential qualifications.

- **Don'ts:**

1. Attend interviews (unless necessary to convey detailed information about the project or services to be performed).
2. Keep the same person on sequential projects without a break between projects.

2. Compensation.

Intel does not determine wages, benefits or compensation for Supplier's employees.

- **Do's:**

1. Pay the contracted price for contracted services (increase and decrease level of service in accordance with mechanisms in the contract).
2. Discuss level of service (not hours for specific employees of Supplier's) with Supplier's supervisor at weekly coordination meetings.
3. Provide feedback requested by and/or respond to Supplier's supervisor regarding performance of Supplier's employees.

- **Don'ts:**

1. Approve overtime hours, vacation, raises in pay for Supplier's employees.
2. Set hours or schedule of Supplier's employees.
3. Evaluate, promote or demote Supplier's employees.
4. Instruct or recommend wage level/compensation for Supplier's employees.

3. Communications.

Intel does not supervise or direct the work of Supplier's employees.

- **Do's:**

1. Ask for status update on their work/expertise.
2. Direct everyone what to do in an emergency situation.
3. Intervene if you witness unsafe conduct (inform the Supplier's supervisor promptly after the incident).
4. Conduct Project Information meetings for all team members to attend (including Supplier's employees).
5. Hold staff meetings for Intel employees and require Supplier to hold separate, regularly scheduled staff meetings for its employees.
6. Intel's Project Manager must conduct regularly scheduled meetings with Supplier's on-site supervisor.

- **Don'ts:**

1. Give work assignments directly to Supplier's employees.

4. Recognition and Awards.

Intel does not directly recognize Supplier's employees for good performance.

- **Do's:**

1. Inform Supplier's supervisor that a particular individual is making a valued contribution.
2. Suggest that an individual be rewarded under Supplier's policies.
3. Have Supplier present awards to its employees (at a staff meeting or at an event for the project team attended by Intel employees

and employees of other Suppliers or contractors who may also be rewarded for valued contributions).

4. Require (by contract) Supplier to co-host events where its employees will be recognized.

- **Don'ts:**

1. Reward Supplier's employees directly (on-the-spot).
2. Present awards to Supplier's employees.

5. Performance.

Some examples of the Situation with Options format, these were developed by Denise Derose of Intel's Human Resources legal department.

The Rules: In order to survive on Intel Island, you must decide with which of the four other managers on the Island—Jenna, Colleen, Richard or RudyZ—to align yourself. The right decision increases your likelihood of success on Intel Island. The wrong decision increases the likelihood that you will be voted off. More than one answer may be right. Correct answers are indicated by masks.

Question: The managers determine that a Supplier's employee is doing shoddy work. With which manager would you align yourself?

Options:

- A. Jenna tells the Supplier's employee to get with it or be terminated.
- B. Rudy relays the performance issues to the Supplier or contract sponsor.
- C. Richard schedules a meeting with the Supplier's employee to discuss the performance deficiencies in detail.
- D. Colleen writes up a warning for the Supplier's employee and provides it to the Supplier.

Answer: Rudy is right. One of the biggest indicators of joint employment is control of the “manner and means” by which work is performed. Discussing performance issues directly with the Supplier’s employee comes too close to controlling the “manner and means” by which the contractor does his or her job, and thus comes too close to making Intel a joint employer. Do not discuss poor performance or specific performance issues directly with a Supplier’s employee. It is okay to have status meetings with them where you discuss progress. Any quality or performance concerns should be communicated to the recruiter or on-site sponsor, who will relay the concerns to the Supplier. Do not discuss or suggest “termination.” Remember, Intel does not “terminate” a Supplier’s employee, we only end the Intel assignment or deny access to the site.

Question: The managers have been impressed by Jason, an ambitious performer, but have heard he is considering other offers. Would you align yourself with any Manager’s attempt to keep Jason on the Island?

Options:

- A. Colleen asks Jason about his pay and promises Jason she will get him an increase.
- B. Rudy, learning that Jason’s pay rate is less than a third of the Supplier’s bill rate, urges the Supplier to increase Jason’s hourly pay.
- C. Richard approves a rate increase for the Supplier due to a scope change, and Purchasing may ask that 100% of the increase be given to Jason.
- D. Jenna makes sure Jason is aware of all relevant job postings for employment at Intel.

Answer: Richard and Jenna are right. Intel managers should not ask what a Supplier’s employee hourly rate of pay is. Neither should Intel managers participate, explicitly or implicitly, in the Sup-

plier’s decisions regarding that person’s rate of pay or how much of the bill rate is actually paid to that person. If managers are aware of a large discrepancy between the bill rate and the person’s pay rate, they should inform the contract sponsor or Purchasing. Purchasing may negotiate lower bill rates where appropriate and may suggest (but not dictate) that increases in bill rates be dedicated to increases in pay rates.

D. Monitoring for Compliance

Intel uses a combination of training and audit requirements to ensure compliance with the policies and procedures established when Intel engages the employees of Suppliers on a temporary basis for a project.

Training is conducted at least once a year and anytime that a new project manager is assigned to a capital project.

It is suggested that a self-audit be sent to the project manager twice a year with a compliance checklist. This serves two functions: to refresh the project manager’s (and team’s) recollection of the policies and procedures regarding the engagement of a Supplier’s employees and as a checklist to ensure compliance with the substantive behaviors required.

We also suggest that the Supplier be audited to ensure that the Supplier has appointed an “on-site supervisor” for the Supplier’s employees working on the project and that regular communication between the Supplier and its employees is occurring.

On capital projects, Intel requires the project team to do “self-assessments” at certain critical points in the project. The management of co-employment issues has been added to the self-assessment and includes: a review of records, verification that project information meetings are occurring, verification that separate staff meetings for Supplier’s employees are being conducted by Supplier’s on-site supervisor, verification that Intel’s project manager and the Supplier’s on-site supervisor are holding regularly scheduled coordination meetings, and an inquiry as to whether Intel is directing any of Supplier’s employees on a day-to-day basis.

E. Summary

- **"Contract for services" with an independent company.**
- **Intel does not "hire" individual employees of Supplier.**
- **Intel does not "train" Supplier employees.**
- **Intel does not determine "wages, benefits or compensation" for Supplier employees.**
- **Intel does not "supervise" or "direct the work" of Supplier employees.**
- **Intel does not "discipline" or "fire" Supplier employees.**
- **Intel does not directly recognize or present awards to Supplier employees for making valued contributions.**
- **Distinguish between "team member" and "employee" for meetings, social events, parties, quarterlies.**
- **Welcome compliance opportunities and participate in them – doing so takes much less effort and much less time than participating in a lawsuit.**
- **Obtain approval of any exceptions to the policies presented.**
- **Make arrangements for Intel Project Team members to receive training on this issue.**
- **Ask questions – don't make assumptions.**
- **Managing a "joint team" requires constant vigilance.**