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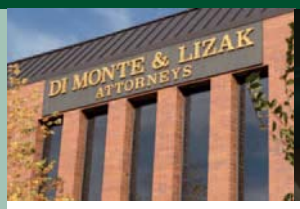

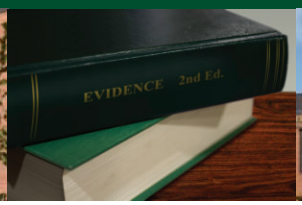


Negotiation - An "Art" or a "Science?"

By Eugene Di Monte

Webster defines a "science" as a "branch of knowledge concerning a subject." A science is often thought of as being definite and predictable. For example, in mathematics we know that if you add 1 + 1, you always get 2. We also know that the area of a square or a rectangle is always determined by multiplying its length by its width. In physics, we know that you can determine foot pounds of energy by multiplying velocity or speed by weight. Simply put, science deals with predictable results.

Webster defines an "art" as a "system of rules and traditional methods for the practice of a craft, trade or profession, the application of knowledge and skill." The results of practicing an art are not always definite or predictable as in a science. The act of negotiation does not always bring about a definite or predictable result. Therefore, negotiation appears to be an art, not a science.

I distinguish between an art and a science because it is important to realize that regardless of the skill

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What Are "Interns" And Do I Have to Pay Them?

By Margherita M. Albarello

With summer approaching, many students will seek "internships," hoping to beef up their resumes, gain experience, and make valuable contacts. Companies will offer internships because they can be excellent recruiting and screening tools. Both parties will ask: Is the internship paid or unpaid?

The answer to whether an intern must be paid hinges on whether or not the intern is an "employee." Companies frequently make the mistake of assuming that interns are not "employees," and, hence, do not need to be paid. However, under the Fair Labor Standards Act (FLSA) an intern may be an employee and therefore entitled to a minimum wage and overtime pay.

The U.S. Department of Labor (DOL) applies a six-factor test to determine whether an intern is an employee. As you go through these factors, keep in mind the adage, "there is no such thing as a free lunch." In other words, the DOL will not allow an entity to engage free labor under the guise of an "internship." As a general rule, the internship arrangement must satisfy all six of the following requirements before the intern is not considered an employee for FLSA purposes:

1. The training must be similar to what would be given in a vocational school or academic educational institution. The issue here is whether the intern is learning generally transferable skills or whether s/he simply is learning how to be an employee of the company's business. To be a non-employee, the intern must be learning skills that s/he can apply outside the entity's workplace;

2. The training is for the benefit of the intern. The intern must be the primary beneficiary of the experience. If the intern performs routine tasks for the company without any real learning experience to the intern, the company looks like the primary beneficiary;

3. The intern does not displace regular employees, but works under the close observation of regular employees;

4. The company that provides the training derives no immediate advantage from the activities of the intern, and on occasion the company's operations actually may be impeded. This factor analyzes the nature of the intern's work and whether the company otherwise would be paying an employee to perform that work. If the intern's work occasionally is corrected by a paid employee, this is strong evidence that the intern is a non-employee. "Shadowing" programs also are strong evidence that interns are non-employees because a company generally does not gain an advantage by having an intern "shadow" a current employee and shadowing actually may impede the current employee's productivity;

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of the negotiator or the procedure followed, and although you may have identical negotiators in two similar but separate transactions following identical procedures and methods of negotiations, the results often differ because of the many variables that come into play. Examples of variables are the parties involved, their needs, moods and financial positions at the particular time, the economy, interest rates, the condition of both parties' businesses, and quite often and very importantly, the egos and personalities of the parties involved.

To be successful in the art of negotiation, one must learn the rules and traditions involved, as in any other art. Following are some of the most significant rules and traditions of the art of negotiation, emphasizing legal negotiations.

1. Know what you are talking about.

Be acquainted with all relevant facts and try to agree upon the facts. Differences must be isolated and identified. The negotiators should also agree, if possible, on applicable law. The facts and applicable law are threshold matters ideally resolved at the outset. However, disagreements regarding either does not necessarily preclude final resolution. Differing opinions regarding the facts or the law will affect each negotiator's view of final resolution.

2. Determine the goals of the parties.

Try to determine the motives and needs of the opposite parties (what exactly each party is trying to achieve). After disclosing the needs of each party, experienced negotiators often can arrive at a solution acceptable to both sides.

For example, if the parties agree that money is the issue, an explanation of the tax benefits or detriments to each may result in an acceptable, mutually beneficial agreement, which may not have been reached without disclosing each party's goals. Considerations may be whether or not the money is taxable or deductible or treated as capital or ordinary income. Disclosing each party's objectives can speed up the negotiation process and assist in resolving a dispute and reaching a final agreement. It is not unusual for an apology from one party to the other to move the other party to accept an otherwise unacceptable proposal. It is essential that the negotiators know and try to understand their client's motives and objectives.

3. Determine the temperaments, personalities and egos of the parties (and of the negotiators).

Ego and pride can be major obstacles to resolving a controversy because everyone wants to win an argument and be proven right. A major function of independent negotiators (i.e., lawyers, real estate brokers, mediators) is to render non-emotional, objective service to the negotiation process. Awareness of the temperaments, personalities and egos of the parties and keeping the parties apart to avoid them from offending each other will allow the negotiators "give and take" during the process without unduly upsetting the parties. *Never* let your ego or pride get in the way of contacting the other party to the negotiation to continue ongoing communication to resolve the problem.

4. Make reasonable demands or offers.

Do not make demands or offers that are unreasonable and which you should know will not be accepted. An unreasonable demand or offer often results in bringing the negotiation process to a halt. Always appear to be reasonable, yet firm.

5. Be honest in your dealings and negotiations.

Be honest without divulging confidences. A negotiator never should be guilty of misrepresentation (different from not saying anything, if what you are withholding will hurt the process). However, not saying anything in certain circumstances may result in a misrepresentation upon which the other party may rely.

6. Do not create obstacles to the process.

Never build a "brick wall," or insurmountable obstacle, between you and the other negotiator. The only time you should say that a point is non-negotiable is when it truly is, and then, depending on the circumstances, after trying to achieve that point without so stating.

7. Disclose "clinching" facts at the opportune moment.

Although certain facts may be very persuasive, consider withholding them temporarily and disclose them at an opportune time when you feel that it will do the most good in bringing the dispute to final resolution, the "icing on the cake," so to speak.

8. Make a definite offer.

In financial negotiations, *never* offer to pay or accept a range of dollars. For example, do not say "I will accept or pay $100.00 to $125.00." We know that if you are the person offering to pay, and you make that offer, you will be asked to pay the higher amount. Conversely, if you are the person making the demand, you will be asked to accept the lesser amount. It is better to set the higher or lower amount at the outset, which the other party may accept or counter.

These are some of the basic rules of the art of negotiation. We hope that by following these simple suggestions and guidelines you will be able to achieve successful results in your negotiations. ■

Contractors - Do You Know Your Obligations Under the Prevailing Wage Act?

By Jeremy Damitio

The Illinois Prevailing Wage Act (PWA), 820 ILCS 130/0.01 *et seq.*, is a law that all construction contractors and subcontractors should be intimately familiar with before contracting to perform public projects. The PWA applies to all "public works" construction projects (i.e., projects funded by public funds) undertaken by a public body (e.g., state, municipality, etc). Generally, it requires that all contractors pay the "general prevailing rate of wages" for each particular type of work being performed and keep and maintain detailed business records. The hourly rates required by the PWA can be an eye-popping experience for some contractors.

Pursuant to the PWA, the public body awarding the project or the Illinois Department of Labor (DOL) sets the prevailing wage for each classification of workers covered under the Act. Worker classifications by county can be found at the DOL's website at www.state.il.us/agency/idol/rates/rates.htm. The PWA requires that all contractors employing workers on the project keep detailed records for each employee regarding the hours and days worked on the project and the wages paid. These records must be kept for three years and be available for review by the DOL. The PWA also requires that all contractors who subcontract out all, or part, of the work include a "written stipulation" in the subcontract that the subcontractor will comply with the Act. If the stipulation is not included in the subcontract, and the subcontractor fails to pay the prevailing wage, the contractor could be liable for any wage underpayments. However, if the stipulation is included, the contractor cannot be liable for any of the subcontractor's violations of the PWA.

The PWA provides for civil and criminal penalties for violations of the Act. Contractors who violate the recordkeeping requirements of the PWA can be charged with Class A and B misdemeanors. Contractors who underpay their employees are subject to substantial civil penalties. For a first offense, a contractor is liable to each employee for the difference between the hourly wage paid and the prevailing rate. Additionally, the contractor must pay the other side's costs of filing a lawsuit, their reasonable attorneys' fees, penalties to the DOL in the amount of 20% of all wage underpayments, and punitive damages in the amount of 2% of the penalty paid to the DOL for each month the underpayments remain unpaid. These percentages rise precipitously for subsequent violations. Furthermore, if a contractor violates the PWA twice within a five-year period it cannot be awarded any public works projects for the next four years. The Director of the DOL publishes a list of debarred contractors or subcontractors at least once each calendar quarter. The PWA also prohibits contractors from firing, disciplining, or taking other forms of negative action toward any employee who files a wage claim under the Act or who offers any evidence of a violation of the Act.

The PWA is a complicated and somewhat confusing statute and is potentially devastating to a business if violated. The issues surrounding the PWA are further complicated by the fact that it largely has gone unlitigated at the appellate court level, which leaves substantial "grey areas" open to different interpretations on how to comply with the Act. To make matters worse, the DOL aggressively pursues potential violations of the Act. Therefore, it is highly recommended that the contractor and subcontractors familiarize themselves with the PWA's requirements or consult with a knowledgeable attorney before engaging in any public works projects. ■

Illinois Raises Minimum Wage

Effective July 1, 2007, the State of Illinois minimum wage increases from $6.50 per hour to $7.50 per hour. The minimum wage will increase by an additional 25 cents in each of the following three years, to $7.75 on July 1, 2008, to $8.00 on July 1, 2009, and to $8.25 on July 1, 2010. ■

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5. The intern is not necessarily entitled to a job at the conclusion of the training period. If successful completion of the internship guarantees the intern a job, the internship looks like on-the-job training, which the FLSA generally treats as compensable; and

6. The company and the intern understand that the intern is not entitled to wages for the time spent during the internship.

Knowing these factors, companies can better assess whether interns are employees under federal law and may be able to structure internships to maximize the argument that the interns are not employees owed wages under the FLSA. If the internship is unpaid, it is advisable that you memorialize the unpaid nature of the internship and the responsibilities and expectations of the parties in order to avoid confusion, disappointment or even a possible lawsuit. ■

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