

UPDATES

INSIDE THIS ISSUE:

<i>What We've Been Doing</i>	1
<i>Independent Contractor vs. Employee</i>	1
<i>Was 2009 the Year for Renewables?</i>	2
<i>NJ Supreme Court rules on email ownership</i>	3

Subscribe to our blogs

- For our environmental blog go to: www.fplegal.com/wordpress.
- For our business blog go to: www.njbusinesswise.com

This newsletter was printed on 100% recycled paper.

WHAT WE'VE BEEN DOING

The last several months have been very busy for me at Frascella & Pisaurro, LLC. In December I tried an eminent domain case in Ocean County. A township took two of my client's properties for open space/recreational purposes. The parties could not agree what the full market value of the properties were and the Township filed suit against my client. The case became very complicated for many reasons including the Township's attempt to take on the properties for less than they originally offered. The jury award my clients \$1,050,000 more than what had been offered at the beginning of the case and close to \$2,000,000 more than what the Township claimed during litigation.

In January I argued on behalf of Public Employees for Environmental Responsibility (PEER) an Open Public Records case against the New Jersey Department of Environmental Protection. PEER had requested the names and documents of people submitted for DEP's consideration to fill the Science Advisory Board (SAB). Judge Fienberg ruled that DEP unlawfully withheld the names and resumes of nominees of the DEP's newly created science advisory board and has ordered the release of the names and documents. A copy of the Court's opinion is on our website.

Also in March I argued a motion as amicus curiae (friend of the court) on behalf of the New Jersey Environmental

Lobby. I argued that New Jersey's strong laws and policies in support of renewable energy could not be overridden by parochial interests of a municipality. A decision on whether a business owner's application to install a wind turbine on his property was improperly denied should be released by the Court shortly.

Lastly, the firm's lease is up at the end of June and we have been spending time on locating new locations and getting our offices ready. I will be moving my office to Pennington right off of Route 31 a few minutes from 95. More information on our move will be released shortly.

-Mike Pisaurro

INDEPENDENT CONTRACTOR VS. EMPLOYEE

In 2005 there was estimated to be over 10 million people operating as independent contractors. Small, medium and large companies all use independent contractors to remain competitive and to grow their businesses but understanding the differences between an "independent contractor" and a regular "employee" is neither easy nor trivial to the business. It is an area that is riddled with traps for the unwary. According to a Department of Labor study, approximately 38% of small businesses misclassify employees

as independent contractors. The problem is not limited to small businesses. Even large, more "sophisticated" companies, such as Microsoft, Federal Express and Wal-Mart, for example, are not immune to this error. Given the current market conditions, it may be even more important for a business to get the classification correct. Tax revenues for all levels of government are down while budget deficits are up. In an attempt to bridge this gap, the Federal government and state governments are going to be taking a closer look at how compa-

nies classify their human resources.

There are many reasons why this classification is often hard to get right. Realize that just because you, the employer, think of the person you hired as an independent contractor, the contract itself might state that he or she is an independent contractor and even the person thinks of themselves as an independent contractor but that doesn't necessarily mean that they really are an independent

(Continued on page 2)

INDEPENDENT CONTRACTOR - CONT'D FROM P. 1

contractor. Furthermore, a person may be an independent contractor under one set of laws but will be considered as an employee under another set of laws. The tests to determine whether a person is an employee or an independent contractor may be different depending on whether it is for taxes, compliance with discrimination laws or the operation of respondent superior or some other law. At least for the purposes of determining whether the right taxes have been withheld it is up to the company to prove that the person was properly classified as an independent contractor and should not have been considered an employee.

The State of NJ uses the "ABC" test for unemployment responsibility and hour and wage requirements. NJSA 43:21-19. Under this test it is up to you, as the employer, to prove that the relationship is that of an independent contract and not that of an employee. Specifically the state would look at the following:

A. Is the person now and continues to be free from the control and direction over the performance of the job? This condition not only has to be in a contract but must be what occurs in fact. If the actual practice is different than what is set forth in the contract, the contract will have little weight.

B. Are the services either outside the usual course of the business or performed outside your physical location? Does the independent contractor work in your office space or do they work from their own location?

C. Is the individual customarily engaged in an independent established profession or business? Are you the independent contractor's only job or does the IC perform work for several other companies?

The business must be able to prove that independent contractor meets all three prongs

of the ABC test and it is important that a business gets the decision right. Failure to meet all requirements could result in the payment of all back taxes, penalties and interest. Such ramifications could transform a company from a success to barley surviving or worse. It may even open the business owner to personal liability for the back taxes.

As a business owner, it is crucial that you fully understand the differences between a true independent contractor and an employee. You must fully understand what need you are trying to fill by the proposed relationship and then structure it to adequately meet your proposed business need so in order to avoid possible issues in the future.

- Mike Pisaurro

NJ utilizes the ABC test to determine whether a person is an independent contractor or employee

WAS 2009 THE YEAR FOR RENEWABLES ?

A lot has happen since the article I wrote, "Renewables and Land Use Law" was published in the American Bar Associations, Natural Resources and Energy Journal back in the summer of 2008. The 2009-2010 legislative year may be

one of the best years for renewable energy in New Jersey. Several laws were passed 2009-2010 in NJ that help move the acceptance and adoption of renewable energy in NJ.

There were two very significant bills that alter NJ's land use laws. P.L. 2009 c. 146 adds the definition of "inherently beneficial" to the land use statutes. Up to now what was inherently beneficial was determined on a case by case basis and only after litigation. With this law, inherently

beneficial is defined to include "wind, solar or photovoltaic energy facility or structure." Being inherently beneficial is very useful for land use applicants who are seeking a D variance from their local land use board. D variances are the toughest to get and require the applicant to show that the positive aspects of the project outweigh the negatives. If your proposed project is inherently beneficial you automatically meet the positive requirements of a D variance. What is left is showing that the proposal does not create a substantial detriment to the public good and will

(Continued on page 3)

The definition of inherently beneficial includes wind, solar or photovoltaic energy facility or structure



NJ SUPREME COURT RULES ON EMAIL OWNERSHIP

In the last two issues of the Firm's newsletter I discussed the ongoing saga of Stengart v. Loving Care Agency, Inc. That saga came to an end recently when the New Jersey Supreme Court

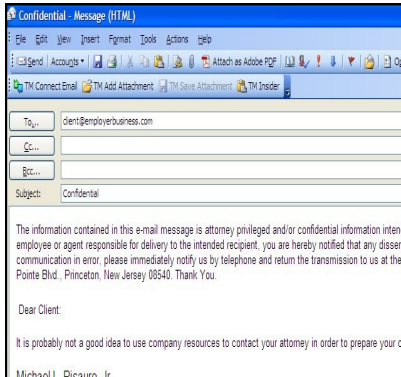
issued its opinion on the case.

The NJ Supreme Court found that "under the circumstances" Ms. Stengart had a "reasonable expectation of privacy" in her emails. The Supreme Court has given guidance to both employees and employers as to what to expect. The Supreme Court based its decision on whether the employee has a "reasonable expectation of privacy". That expectation is determined, in part, by the company's policy on the issue. The

Court assumed the company had a policy in place, because there was some question on the issue. The written policy did not mention that the company was making images or copies of its employee's activities on the computer. The policy also did not define some of the terms it used, such as, like "media systems and services" and did not discuss at all the ramifications of using a personal, web-based email account. The policy was also silent as to whether the company considered the personal email account message as part of its email system and its prop-

(Continued on page 4)

Make sure computer usage policies are in writing and are clear.



RENEWABLES IN 2009 — CONT'D FROM P.2

not substantially impact the zone plan and township ordinances.

Another law that will have far ranging implications is P.L. 2009 c. 244. This law goes even farther than P.L. 2009 c. 146. In essence this bill requires municipalities to allow small wind turbines within their borders. The bill provides that municipalities "shall not unreasonably limit such limitations or unreasonably hinders the performance of such installations." Now municipalities cannot enact ordinances that unduly restrict the installation of renewable energy. When a municipality does not enact an ordinance, the law provides some minimums.

Another law requires developers of 25 houses or more to offer solar panels as an option. In enacting the law, the State has declared that, "[t]hat the installation of even small scale solar energy sys-

tems will combat global warming and reduce the nation's dependence on foreign energy sources, resulting in a significant environment benefit."

Lastly, we have increased our Renewable Energy Portfolio Standard (RPS). The RPS requires a certain percentage our electricity comes from renewable sources. We have had a RPS for several years now, but the new law increases the amount in accordance with the goals of the State's Energy Master Plan. The amount of energy from renewable sources increases over time.

The law also permits that the above schedule can be increased by 20% if in the three preceding years there were enough or excess SRECs to meet the requirements and the average price of SRECs in the same three years decreased.

The State changed the system from requiring a percentage of energy to absolute numbers

because of the intent in the Energy Master Plan to reduce overall all energy demand. If the RPS requirements remained as a percentage the State would start generating less electricity from renewable energy sources the more successful the EMP was.

All of these new laws move renewable energy in NJ forward. They make it less expensive to buy, obtain permits and install. The laws improve the market for renewable energy by creating a greater demand. While NJ has moved forward we still have some road to travel. For a more complete explanation of the renewable energy laws passed last year, please visit my blog, GreenPages-NJ.

- Mike Pisaurro

FRASCELLA &
PISAURO, LLC.

100 Canal Pointe Blvd.
Suite 209
Princeton, NJ 08540

Phone: 609-919-9500
Fax: 609-919-9510
Email: attorneys@fplegal.com

www.fplegal.com

Blogs: www.fplegal.com/wordpress

www.njbusinesswise.com

*Meeting and exceeding your
expectations*



The contents of this newsletter is intended for informational purposes only and should not take the place of legal advice. Should you have any questions regarding this newsletter, please contact us at the address above.

EMAIL OWNERSHIP— CONT'D FROM P.3

erty or whether such accounts were considered outside the company's property interests. Given the many ambiguities created by the policy, the Court found Loving Care's Employee Handbook was ambiguous and unclear.

As lawyers learned in "Contracts 101" is that, in a contract, ambiguities will be construed against the drafter. In this case the ambiguities were used against the company and in favor of Ms. Stengert. As the policy did not clearly apply to password protected web-based emails, the Court was not going to apply to the company's policy that emails were part of the company's business records to Ms. Stengert's yahoo emails.

From an employers' prospective it is clear that if you want

to "own" all the activity that occurs on a company computer, you must make that position very clear in your handbooks and policies. If a company is going to use logging or imaging software to track usage, that fact needs to be disclosed as part of the company's written policies. Even with very clear policies in place, I am not sure that a Court would enforce a handbook policy that results in the company owning, and being able to use, personal emails from an employee to their physician or accountant, etc. An employer probably could ban all personal use of the computer and also could install filters and software to prevent employees from going to certain websites, such as Yahoo mail, AOL or gmail. However, while these options may be legal and technically possible, I do not believe that such tactics acknowledges modern reality: Employees

need access to computers and the internet on a daily basis for personal use. In short the policy has to be clear and reasonable if it has a chance of being enforced.

- Mike Pisaurro

To read more on this case please read the following articles on NJ Businesswise:

Are your electronic communications at work private or employer property?

Appellate Division Restricts Company's Computer Usage Policy

Why it's important to establish a computer usage/electronic communication policy ?