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Joel Goldblatt, Andy Arons & Eli Newman



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## About WBS

Williams, Bax & Saltzman, P.C. is a full-service law firm, representing and advising businesses, nonprofits, fiduciaries and other individuals. Our attorneys are committed to providing value-added services to our clients in a cost-effective manner.

### Practice Areas

- Commercial Litigation
- Corporate
- Labor and Employment
- Real Estate
- Construction
- Insurance
- Professional Liability
- Product Liability
- Information Technology
- Estate Planning, Trust Administration and Probate

### Our New Paralegals

**Wren P. McMillan**  
**Michael B. Vaia**  
**Lauren Clemens**

## POWERS OF ATTORNEY FOR THE PHYSICALLY LIMITED CLIENT

Key elements of a complete estate plan include health care and property powers of attorney providing trusted parties authority to act on your behalf when you are unable to do so yourself. This may be particularly important for elderly or other clients suffering from a physical condition, such as paralysis or other neurological disorder, that restricts or otherwise impairs the ability to move or sign documents.

Illinois provides two methods of executing powers of attorney depending on the physical capabilities of the grantor of the power, known as the “principal” – signature by mark and signature by proxy.

**Signature by Mark.** If the principal creating the power of attorney (“POA”) is able to make a mark but unable to sign their name, Illinois law permits the principal to sign by making a mark such as an “X”. For the mark to be valid, it must be made in front of a notary and two witnesses who must positively identify the individual and either personally observe the marking or verify that the principal told them that the mark on the principal signature line is his or hers. As incorporated in standard statutory short forms and non-statutory health care power of attorney forms, the witnesses must also represent that they are not the agent or successor agent named in the POA; related to the principal, the agent(s), or the successor agent(s) by blood, marriage, or adoption; the principal’s physician, advanced practice nurse, dentist, podiatric physician, optometrist, psychologist, or a relative of one of those individuals; or an owner or operator (or the relative of an owner or operator) of the health care facility where the principal is a patient or resident.

**Signature by Proxy.** In 2023 Illinois law was revised to permit a signature by proxy for individuals who cannot make a mark at all. The principal can direct a third party to sign the principal’s name as their proxy with both the direction and the signature on the power of attorney taking place in front of a notary and witness. Special notary and witness language must be included in the power of attorney regarding the identity of the principal and their authorization for use of a proxy to sign the document.

**Practical Application.** As is always the case, prior to assisting an individual with executing powers of attorney it is imperative to determine whether the principal has sufficient mental capacity at the time of execution to understand the decisions that they are making. In the event such capacity is lacking, the agent typically must petition the court for guardianship or a conservatorship rather than executing a POA.

Also, due to the control over the principal’s property and/or healthcare decisions that can be granted in a POA, it is essential to ensure that the principal fully understands the scope of authority being granted to an agent and has carefully considered whether an appropriate agent is being selected. Note that to ensure understanding, it may be advisable to read the POA document(s) out loud to the principal if he or she has a serious visual impairment or lacks the ability to easily handle and turn pages.

Video recording the reading and execution of a POA may also be helpful in providing clear evidence of the principal’s mental capacity, intentions, and authorization of powers of attorney executed by mark or proxy.

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For more information about powers of attorney or other trust and estate documents, matters or court proceedings, please contact WBS estate planning attorney Joel Goldblatt, Andy Arons, David Williams or Sid Levine.

## Recent WBS Cases & Transactions

### **Commercial Eviction**

On appeal of a ruling after trial in a commercial eviction action, **Doug Bax** and **Dave Strubbe** obtained a decision reversing the Circuit Court of Cook County and requiring entry of a seven-figure judgment for WBS's property owner client.

### **Equipment Lease Dispute**

As co-counsel on behalf of a WBS equipment lessor client, **Tom Koessel** obtained a seven-figure Northern District of Illinois federal court jury trial verdict in a suit against a petrochemicals company for misuse and damage to a leased industrial boiler.

### **Restrictive Covenant Enforcement**

Settling a federal court suit against a WBS freight logistics broker client's former employee, **Kerry Saltzman** and **Patrick Spellman** enforced contractual non-compete and non-solicit covenants and obtained a six-figure recovery for profits lost due to the employee's breach of contract.

### **Shareholder Dispute**

In defending a high six-figure action for breach of fiduciary duty and post-dissolution accounting among former law firm partners, **Doug Bax** and **Spencer Griffin** obtained a summary judgment ruling in the Cook County Circuit Court Chancery Division exonerating WBS's client from any liability to her former law partner.

### **Special Purpose Commercial Lease Dispute**

On behalf of a WBS real estate developer client **Doug Bax** and **Mitch Bryan** obtained a summary judgment ruling on lease interpretation and performance issues preliminary to proof of seven-figure damages at an upcoming trial in Will County Circuit Court against a construction company who leased the client's property to facilitate performance of a nearby road construction project.

### **M&A Transactions**

During 2023, **Joel Goldblatt**, **David Williams** and **Andy Arons** closed corporate sale and purchase deals for WBS clients totaling roughly \$100 million in gross sales proceeds involving, for example, janitorial supply, grocery supply, restaurant and financial services businesses.

## THE UNITED STATES DEPARTMENT OF LABOR HAS ADOPTED A NEW TEST TO DETERMINE INDEPENDENT CONTRACTOR STATUS

The U.S. Department of Labor (DOL) published a new rule to distinguish employees from independent contractors for purposes of minimum wage and overtime pay under the Fair Labor Standards Act (FLSA). The FLSA governs minimum wage and overtime requirements applicable to employees but not independent contractors. The new rule goes into effect on March 11, 2024.

### **Previous and New Tests**

The previous rule relied on an "economic reality" test, which utilized two "core factors" to determine whether an individual should be classified as an independent contractor or an employee. Those factors were: (1) the nature and degree of the individual's control over the work that was performed; and (2) the individual's opportunity to incur a profit or loss from the work performed.

The new rule replaces the "economic reality" test with a "totality of the circumstances" test, which focuses primarily on the individual's level of economic dependence. The new test includes the analysis of six factors, none of which on their own is determinative. In fact, additional factors may also be considered if they are relevant to the overall question of economic dependence. The six factors are:

1. The individual's opportunity for profit or loss,
2. Investments by the worker and the potential employer,
3. The degree of permanence of the relationship,
4. The nature and degree of control over the work performed,
5. Whether the work performed is an integral part of the potential employer's business, and
6. The individual's level of skill and initiative.

The new rule is more employee-friendly than the previous rule and its adoption will likely lead to more individuals being classified as employees. This could result in higher costs for employers in terms of overtime pay, health and welfare benefits, paid and unpaid leave allowances and income-related taxes. It is expected that the new rule will have an especially significant impact on industries that heavily utilize so-called "gig workers."

The new rule will not have a significant impact on employers in states such as California, Illinois, Massachusetts, and New Jersey, who have adopted their own classification tests for compliance with wage and hour laws. The new rule only revises the DOL's interpretation under the FLSA and potential employers are advised to ensure that they are meeting whichever standard provides the greatest level of protection to workers.

### **Consequences of Misclassification**

The misclassification of employees as independent contractors can result in significant liability, including unpaid minimum wages and overtime, liquidated damages, attorney's fees, fines, penalties, and other costs. Employers should therefore consider taking steps to mitigate the risk of a misclassification, including conducting audits to ensure independent contractors are properly classified under the new rule, determine if classification changes are required, update policies and procedures, and train managers on best practices for navigating independent contractor relationships.

Because classification issues are complicated and errors can result in significant exposure, employers would be best served to work with legal counsel when it comes to taking these proactive measures.

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If you need assistance or have any questions about the new DOL rule, please contact WBS employment law team member Kerry Saltzman, Tom Koessel or Patrick Spellman.

