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## TODAY'S FORECAST: Lots of Clouds (Could a Storm be in the Offing?)

*It sounds surreal and spacey. Even air-headed. But it's a real term... Cloud Computing. And you might already be doing it without even knowing.*

Named for the cloud symbol that is often used to represent the Internet in flowcharts, cloud computing is a new model for delivering hosted online services. Using shared resources on virtual servers, it can provide infrastructure, platform, software, data storage, and information on demand—quickly and invisibly to the consumer.

Cloud computing differs from traditional hosting in that it's fully managed by the provider. A company needs only a computer and Internet access to hop on a cloud. Still foggy? Think Google Mail, or Salesforce.com—two well-known examples of cloud computing applications.

The benefits of this new phenomenon are readily identifiable. Because it uses a virtual, shared infrastructure, there's less need for hardware and software—resulting in substantial cost savings and efficiency on many levels. Given that an increasing number of respected companies are utilizing cloud computing applications, there's a good chance your organization will—or already is—on a cloud too.

But like real clouds, cloud computing takes many shapes and is comprised of many layers. Providers and subcontractors may share a cloud infrastructure, using it for several functions. And that means a risk of storms.

### SECURITY AND PRIVACY

The lack of traditional security set up at a physical location is a big concern. As cloud computing is used for more and more purposes—including the storage of sensitive data and personal information—safety and privacy become more urgent. Increased diligence is needed to identify each provider and ensure they are in compliance with data protection laws.

### WARRANTIES

What warranties, if any, come with cloud computing? Providers will try to limit them; users will expect them. While not unique to cloud computing, given the imprecise nature of the model, some level of protection is needed.

### CONTROL AND RETRIEVAL

It's unclear who actually controls data in the cloud. Yet, your organization must maintain the ability to switch providers and move data without undue burden. If you should receive a document request or subpoena, you may need to retrieve information from the cloud, or face possible sanction.

### JURISDICTION

In case of litigation, what court will have jurisdiction to hear and decide a dispute with a cloud provider? The traditional notion of physical presence that guides jurisdiction and venue become... well, cloudy.

### LEGAL PROTECTION

Grab your umbrella before you venture out. If your organization is thinking of cloud computing, you can minimize the risks by including appropriate language, tailored to your specific applications and functions, in your agreements with providers. Key contractual terms should include: responsibility for subcontractors; compliance with applicable laws and regulations; warranties and service levels, with specified remedies; indemnifications; and governing law and jurisdiction.

The cloud is a cool, breezy, ever-changing technology. In light of the forecast, however, seeking legal protection is advised. Call us if you'd like help.

Information Technology  
Kathryn L. Ossian 313.496.7644



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# IS IT TIME TO HIRE?

## New Law Offers Incentives to Add Workers

*Thinking of hanging out the Help Wanted sign? Might be a good idea—and tax-wise too. The aptly named HIRE Act (“Hiring Incentives to Restore Employment”) was signed into law in mid-March, making this an opportune time to increase personnel.*

The HIRE Act creates two significant tax inducements designed to encourage companies to hire and retain unemployed workers: a Social Security tax exemption, and a tax credit for retaining newly hired employees.

### **BEEF UP YOUR WORKFORCE EXEMPTION ON SOCIAL SECURITY TAX**

The new law provides employers an exemption from their share of Social Security taxes attributable to any wages paid to a qualifying new employee after March 18, 2010, and before December 31, 2010. Since Social Security tax is imposed on employers at a rate of 6.2% on the initial \$106,800 (for 2010) of wages paid to each employee, this exemption could provide a savings of up to \$6,621 for each newly hired employee.

Private sector employers, taxable businesses, tax-exempt organizations, and public colleges and universities are eligible—however, government employers are not.

To qualify for the tax exemption, employers will need to make certain those they hire meet certain requirements. Specifically, new employees must:

- Certify they have been unemployed, or employed for less than 40 hours, during the 60 days immediately preceding their start of employment
- Commence employment after February 3, 2010, and before January 1, 2011
- Not replace an existing worker, unless that worker left the job voluntarily or was terminated for cause
- Be unrelated to the employer, and not own—directly or indirectly—more than 50% of the employing company

An employer who claims the Social Security tax exemption with respect to wages paid to a qualified employee in 2010 cannot claim the Work Opportunity Tax Credit (WOTC) for that same employee during the initial year of employment. Employers will want to compare the benefit of this Social Security tax exemption and WOTC, as the WOTC may provide a greater tax benefit for wages paid to lower-compensated workers.

It's important to note that the exemption does not eliminate an employer's liability for its share of Medicare tax on an employee's wages, nor that employee's share of Social Security and Medicare taxes.

### **KEEP UP THE GOOD WORK TAX CREDIT FOR RETAINING EMPLOYEES**

The HIRE Act also offers incentives to retain those new workers. For each qualified employee a company hires in 2010, that company is entitled to a non-refundable income tax credit for any tax year ending after March 18, 2010, in which these requirements are first satisfied:

- The qualified worker was employed by the company on any date during the tax year
- That same worker was employed by the company for 52 consecutive weeks
- During the last half of the 52-week period, the employee's wages were not less than 80% of the wages paid during the first half of that same period

The tax credit available to an employer for each qualified employee is equal to the lesser of \$1,000 or 6.2% of each qualified employee's wages paid during the applicable 52-week period. Unused credits may be carried forward but cannot be carried back.

Ready to hire? If you would like to take advantage of the HIRE Act's incentives and need more information, please call us for some help. This could be a win-win for your company—and for a deserving job candidate as well.

Tax  
Ryan J. Riehl 313.496.7539



# High Court Ruling on *Constructive Termination* Seen as **VICTORY FOR FRANCHISORS**



*A franchisee can't sue for "constructive termination" when it continues to operate the franchise.*

In March, the U.S. Supreme Court issued a unanimous opinion in *Mac's Shell Service, Inc. v. Shell Oil Products, Inc.*, which held that, absent a factual showing of an end to the franchise relationship, there was no termination.

In *Mac's Shell*, 63 franchisees sued Shell Oil, claiming constructive termination because a rent subsidy had been eliminated.

Although a jury found in favor of the franchisees, Shell appealed, arguing no liability under the Petroleum Marketing Practices Act because none of the dealers abandoned their franchise and all had executed new franchise agreements.



The Supreme Court agreed, holding that a franchise relationship must end, be annulled, or be destroyed to sustain the theory of constructive termination. The court reasoned that a franchisee who continues occupying the same premises, receiving the same fuel and using the same trademark, has not had the franchise terminated in either the ordinary or technical sense of the word.

In fact, the Court used the analogy of "constructive discharge" in employment law, and "constructive eviction" in landlord-tenant law—both of which require the plaintiff to wholly terminate the relationship. "Constructive," said the Court, meant only that the termination occurred because the plaintiff, rather than the defendant, put an end to the legal relationship.

Going forward, that reasoning—based on strict interpretation of the statute and a plain-language analysis—may arguably be applied to claims of "constructive" termination, discharge, non-renewal, or cancellation in the context of any franchise relationship.

If you're confronted with a claim in this regard, we would welcome the opportunity to help.

Franchise + Distribution  
Amy M. Johnston 313.496.8479





# DOING BUSINESS WITH OUR NORTHERN NEIGHBORS?

## Canada's Regulation 105 Mandates Withholding Tax on Non-Resident Service Providers

### QUICK TAKE

- Canada's Income Tax Act requires 15% withholding
- The regulation applies to non-resident service providers
- Non-resident workers should factor in the cost when setting fees

*In today's global marketplace, services are often rendered across borders, without much consideration for tax implications. That would be a mistake.*

Some businesses that have engaged non-residents to perform services in Canada have learned the hard way that ignorance is not bliss when it comes to their withholding tax obligations under Regulation 105.

Part of Canada's Income Tax Act, Regulation 105 requires a business to withhold 15% of any fee, commission, or wage paid to a non-resident for services rendered in Canada, and to remit that payment to the Canada Revenue Agency (CRA). The law applies whether the business is Canadian or not. And it applies even if the non-resident service provider is not liable to pay taxes in Canada.

There are, of course, some exceptions.

A non-resident, or the business engaging that non-resident, may apply to the CRA for a waiver—although the CRA is reluctant to issue them. Even if a waiver is provided, the non-resident is still obligated to file a tax return in Canada for all Canadian-source income.

If a waiver is not obtained, a non-resident may apply to the CRA for a refund if the income earned in Canada falls under a treaty-based exemption. In some cases, non-resident employees under temporary assignment may be exempt from Regulation 105—although, in such cases, withholding is required at the statutory rate set forth in the Income Tax Act, Regulation 102.



**The important point:** Businesses that engage non-residents to perform services in Canada must be aware of their Regulation 105 obligations, and those obligations should be addressed in all service agreements. Likewise, non-resident service providers should consider withholding

obligations and the delay in receiving full payment for their services when setting their fees—possibly factoring in any additional costs that may result from having to file tax returns in Canada.

If you are doing business in Canada and would like more information on Regulation 105, or any of Canada's Income Tax Regulations, please call us for some help.

Tax  
Marco Dolfi 519.790.7468

# THE X FACTOR

## Judicial Point of View is Key in Deciding Appellate Outcome

*You've gone to trial, and the decision was not in your favor. What's next? Before launching an appeal, take a look at the larger picture says former Michigan Supreme Court Justice Clifford Taylor. We asked Justice Taylor to share his insight for this issue of Hot Points. Here's what he had to say.*

If you're thinking about whether to appeal after an adverse outcome in trial court, it's a good idea to consider more than just the actual constitutional provision, statute, or case law that formed the basis for the lower court's ruling. An appellate judge's view of the proper role of the court in interpreting a document can mean all the difference between winning and losing.

Of course, the most important factors in any appeal are always your facts—and the laws related to your case. But it's the wise litigant who considers whether recent cases reveal a jurist's inclination toward a broad, equity-producing interpretation, or a narrower, intention-of-the-drafters' approach.

In today's American courts, there are two schools of thought on how judges should approach written documents—whether the federal constitution, state constitutions, statutes, or contracts—before the court.

Traditionalist judges hew closely to the "original understanding" of all legal instruments. They spurn novel or expansive interpretations that deviate from the trajectory of the language itself, arguing that it is beyond their power to re-write these documents. Such traditionalists (in the model of Justice Antonin Scalia of the U.S. Supreme Court) assert that adhering to this discipline produces stability and predictability in the law.

Litigation  
Clifford W. Taylor 517.483.4989

On the other side are judges who approach written instruments more aggressively in the quest to produce what they argue are more fair and satisfying outcomes. To arrive at equitable decisions, they approach the law more expansively and look beyond the words used to get at the perceived purpose. As an adherent of this approach, President Obama has described it as yielding a more empathetic result.

This split accounts for the "x factor" in an appeal. In difficult cases, judges of each school will honorably differ from each other, simply because of the place in which they begin their interpretive effort. Traditionalists may look at a document and give it a natural reading, without much regard for the result it produces. Empathetic jurists have an eye on the desired outcome, and thus chose an interpretive approach that will effectuate that objective.

Both are simply doing their best. But as a potential appellant, be aware that this split exists and might well determine how your case is decided. In short, the judicial point of view can make all the difference.



### THE HONORABLE CLIFFORD TAYLOR JOINS MILLER CANFIELD

*Former Chief Justice of Michigan Supreme Court  
Adds to Our Appellate Strength*



Our firm gained an experienced and highly respected jurist in February. Clifford W. Taylor now serves Of Counsel in the appellate section of our Litigation and Trial Group in the Lansing, Michigan, and Naples, Florida, offices.

Justice Taylor was appointed to the Michigan Court of Appeals in 1992 and elected the following year. He remained in that position until 1997, when he was appointed to the Michigan Supreme Court. Taylor served 11 years on the State's high court, twice being re-elected by the citizens of Michigan. He was elected Chief Justice by his colleagues, a position he held from 2005 to 2009.

At Miller Canfield, Justice Taylor will focus on appeals involving federal and state constitutional, statutory, and public policy matters, helping to form appeal strategy and oral arguments on appeal. He will also serve as an arbitrator and mediator.

# SUCH A DEAL

SAVVY SHOPPERS CAN FIND SWEET SAVINGS IN 363 SALES  
—IF THEY KNOW HOW TO REDUCE THE RISKS—



## QUICK TAKE

- Section 363 of Bankruptcy Code can protect buyers of distressed assets
- Bankruptcy court order should make sure purchase is free of liens, claims, and encumbrances

*Looking for a bargain on business assets? Look no further than recent bankruptcy filings, where tempting deals abound for those willing to exercise good judgment, conduct due diligence, and engage the advice of experienced counsel.*

Section 363 of the Bankruptcy Code gives debtors the ability to liquidate all or part of their assets through court-supervised sales. And that can mean deep discounts and favorable terms for smart buyers.

The key is to acquire the assets without the baggage. In other words, make certain the purchase is free and clear of any liens and encumbrances.

Outside of bankruptcy, used asset sales can carry risks under continuity or successor liability doctrines, which transfer certain seller liabilities to a buyer. But Section 363 offers buyer protection.

Of course, that protection assumes Code conditions are met. For example, if a buyer expressly or impliedly agrees to assume certain debts or liabilities, or the buyer is merely a continuation of the seller, the protection would not apply.

Successor liability protection begins with the language contained in the Bankruptcy Court Order, which approves the sale. The Order should:

- Absolve the purchaser of future liability
- Enjoin any holder of interest, claim, or lien from taking action against the buyer
- Explain the purchaser's reliance on the determination that it will not be subject to successor liability

- Specifically identify any liabilities being assumed by the purchaser, and those not assumed
- Declare the buyer to be a "good faith" purchaser
- Reserve the bankruptcy court's jurisdiction to enforce the sale order



Finally, to help prevent a successor liability challenge, both the sale notice and the sale order should be provided to all creditors, interest holders, and other involved parties. Widespread publication of the sale notice—especially in areas where potential claimants may be found

—can aid in defending any future challenges to due process.

With the growing number of bankruptcy filings out there, your business could strike a deal. Just be certain you seek the advice of qualified counsel to see you through the process and complete a successful 363 sale. If you're interested in learning more about 363 opportunities, please contact Miller Canfield's Bankruptcy, Restructuring, and Insolvency Group.

Bankruptcy, Insolvency + Restructuring  
Eric D. Carlson 313.496.7567

# Heads Up!



## PLAN NOW FOR NEW SURTAXES Some Will Pay More, Beginning in 2013

*It's not too soon to start thinking about your 2013 taxes. What's that you say? You've barely finished filing for 2009? Trust us. If you're among the nation's upper earners, you'll want to get ready now.*

**Start by taking a look at Line 37 on your most recent 1040.** That number, plus your foreign income, is your Modified Adjusted Gross Income or "MAGI." The figure on Line 37 will determine whether you'll be subject to the new 3.8% surtax that's part of the recently adopted healthcare reform package.

The 3.8% tax will apply to individuals whose MAGI exceeds \$200,000; to married couples filing jointly who together have a MAGI in excess of \$250,000; and to married individuals filing separately whose MAGI is more than \$125,000. The surtax is on the lesser of either your MAGI above these thresholds, or your net investment income.

For tax purposes, net investment income is your gross investment income, over your allowable investment expenses. It includes earned interest, dividends, capital gains, annuities, rents, royalties, and passive activity income. It doesn't include distributions from your IRA or other tax-qualified retirement plans, income for self-employment tax purposes, or active trade and business income. But the trap here is that your IRA or tax-qualified distributions could push you above the threshold—and your investment income would be subject to tax.

Trusts and estates will also be subject to the tax if their income exceeds \$11,200—an amount that will be adjusted for inflation before 2013.



**Will the 3.8% surtax affect you? If it appears the answer is YES, you'll want to talk to your financial advisor or attorney soon. Advance planning can help minimize the impact of the new tax.**

- Roth IRAs don't carry minimum distribution requirements. So, if you don't need those funds after 2012, you can defer and hold your adjusted gross income below the threshold level.
- Municipal bonds and other tax-deferred instruments may be more attractive investment strategies.
- Certain life insurance policies allow you to withdraw your "cost basis" first, or borrow against the policy, without generating taxable income.
- If you are charitably inclined, consider a Charitable Remainder Trust or Charitable Lead Trust—both of which allow you to claim a tax deduction and still receive income.

- Timing of income—whether from investments in oil and gas, real estate, dividends, installment sales, or sales of securities—will be more important than ever. Your advisor can suggest some strategies to help offset post-2012 taxable income.

We're happy to review your options and discuss tax strategies. Call our office if you'd like some help.

Tax  
Kal G. Goren 248.267.3267

### QUICK TAKE

- Net investment income may be subject to surtax
- Deferring distributions, shifting to other investment strategies can help

*Hot Points* is published as a free service to Miller Canfield clients and friends.

The articles in *Hot Points* are for general information only and should not be used as a basis for specific action without obtaining legal advice.

If you would like your name added to our mailing list, please call Heather Willis at 313.496.7902.

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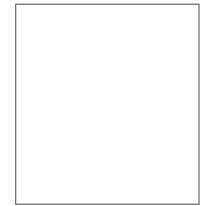
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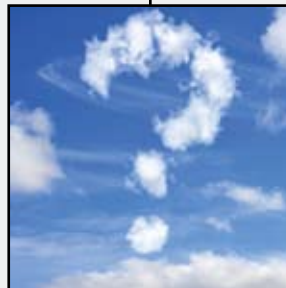
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# Federal Estate Tax Status STILL UNCERTAIN

As we go to press, Congress has yet to take action to reinstate the Federal Estate Tax for deaths occurring in 2010. Effective January 1, 2010, the tax was repealed for individuals dying during the year. Under current law, the estate tax is scheduled to return in 2011, reverting to a \$1 million exemption and a maximum estate and gift tax rate of 55%.



In the meantime, it's unclear how estate planning documents, which reference tax concepts such as the estate tax exemption and marital deduction, are to be interpreted. It may be prudent to review your plan in light of this unusual situation.

For up-to-the-minute developments, log on to our website, [millercanfield.com](http://millercanfield.com), and click on "Alerts."