

ALERT

LABOR & EMPLOYMENT

August 2008

Independent Contractor Agreements Under Attack

Gone are the days of government agencies and regulatory authorities blindly accepting a business classification of individuals as “independent contractor.” Indeed, state and federal governments have started to focus on the misclassification of employees as independent contractors. This increased scrutiny makes it critical for employers to determine whether their workers are employees or independent contractors.

Several states have implemented initiatives to ensure that companies are not avoiding overtime pay, unemployment compensation, payroll taxes and employment-related rights and benefits by misclassifying employees as independent contractors. For instance, California has recently sent “employment relationship” questionnaires to “independent contractors” to ensure that those individuals are not more rightfully classified as employees. Moreover, the Illinois Employee Classification Act went into effect in 2008. This law, which applies to the “construction” industry, prohibits the misclassification of employees as independent contractors and provides stiff fines for non-compliance.

The federal government also appears poised to join the attack. In late May 2008, the U.S. House of Representatives introduced the Employee Misclassification Prevention Act (H.R. 6111). As its name suggests, this legislation targets employers who misclassify their employees as “independent contractors.” If passed, this legislation would make the misclassification of employees a prohibited act under the Fair Labor Standards Act and increase penalties under the FLSA. The legislation would also require employers to keep records regarding their classification of workers, notify workers of their classification, and allow them to challenge that classification. In addition, the proposed legislation would require state unemployment insurance agencies to conduct audits to ascertain which employers are misclassifying their employees, it would authorize the Department of Labor (DOL) and the Internal Revenue Service to share information on instances of misclassification, and mandates that the DOL perform audits focusing on industries that frequently misclassify employees.

In light of the increased scrutiny on independent contractor relationships, employers should conduct internal audits to ensure they have properly classified their independent contractors and to effectively address any misclassifications. For more information regarding auditing your independent contracts or any labor and employment issues, contact the firm’s labor and employment lawyers in the following offices: Kenneth J. Yerkes, Chair (317-231-7513); Norma W. Zeitler, Chicago (312-214-

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