

Misclassification of Independent Contractors – Increased Risks and Damages under New Law

In the past few years, the United States Department of Labor (“DOL”) has greatly increased its efforts to punish employers who misclassify employees as independent contractors. In fact, the DOL has recently entered into a Memorandum of Understanding with the IRS and 11 states to share information in order to further assist in these efforts. Massachusetts has enacted its own, somewhat infamous, independent contractor law, which many commentators feel makes it all but impossible for a company to hire independent contractors without them being deemed employees. For these reasons, we have been strongly suggesting that employers make sure their workers are properly classified.

This past summer, Rhode Island jumped into the fray, enacting an employee misclassification statute, making it an illegal violation of the state’s existing wage payment laws to misclassify a worker. A company that violates the Rhode Island statute is responsible for a mandatory fine of between \$500 and \$3,000 per worker, a penalty of two times any lost wages, attorneys’ fees and interest. Additional exposure includes potential liability for unpaid tax withholdings, Social Security and Medicare payments, workers’ compensation and unemployment insurance premiums, benefits and overtime pay. Simply stated, the effects can be financially devastating. Adding to the injury is the fact that misclassification mistakes are typically not limited to a single employee; it is far more common for an employer to misclassify a larger number of workers performing similar duties. While the tests vary for whether a worker is an independent contractor or employee, the key issue is the level of control the company is able to exercise over the worker. This inquiry is fact intensive. Very often a company believing it is not exercising any significant control over the worker does, at least under the law, qualify as the worker’s employer.

All employers are well-advised to do an audit of their workforce to ensure compliance with existing laws. Even if the company ends up in a disagreement with the DOL, the fact that the company took compliance efforts goes a long way towards eliminating discretionary fines and penalties such as double damages and attorneys’ fees penalties.

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