

Make Sure Your Independent Contractors Are Correctly Classified

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A recent lawsuit against Northwestern Mutual Life Insurance Company underscores the need for employer care in correctly classifying independent contractors. On June 25, 2009, three former employees of Northwestern Mutual filed a class action lawsuit alleging that sales and financial representatives of the Company had been incorrectly treated as independent contractors under federal and California state law. The complaint seeks class certification and damages of more than \$200 million. Plaintiffs' case is based upon the degree of control Northwestern Mutual had over these alleged independent contractors, including their hours of work, their office and equipment, performance quotas and non-competition agreements. According to the complaint, the Company required the alleged independent contractors to work a minimum of 10 hours a day for five or six days a week. Plaintiffs therefore seek overtime and a higher hourly rate since the effective rate for these California employees was less than the minimum wage.

On the same date, attorneys general from the states of Rhode Island, Iowa, Kentucky, Missouri, Montana, New Jersey, Ohio, and Vermont asked that FedEx Ground ensure that its drivers retain the proper characteristics to justify classification as independent contractors. The primary focus of the states' concerns is the absence of workers' compensation premiums, unemployment insurance premiums as well as wage and hour protections. The attorneys general formed a working group and have threatened to pursue action to "make states whole" for past practices, including billions of dollars in uncollected tax revenues and insurance premiums.

Based on these actions as well as potential federal legislation focusing on the independent contractor classification, employers should make sure that their use of the independent contractor classification is defensible and warranted. The primary culprit which undermines this classification is employer control over the means and manner in which assigned tasks are carried out. In addition, since the ability of the alleged independent contractor to perform work for others is a key requirement, any restriction on this ability such as a non-competition agreement, undermines this classification. Finally, employees need to remember that the ingredients for independent contractor status vary by the setting—whether workers comp, unemployment comp, tax laws, or others.