

WSGR ALERT

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FEDS TARGET INDEPENDENT CONTRACTOR MISCLASSIFICATION

Citing a desire to minimize losses in contributions to unemployment insurance funds, protect workers' rights, and "level the playing field" for employers that abide by the law, the United States Department of Labor's (DOL's) 2012 proposed budget reflects aggressive plans to target the misclassification of employees as independent contractors. The initiatives included in the proposed budget represent the latest development in a series of efforts by the DOL to curb worker misclassification. Of perhaps greatest significance is the DOL's request for an additional \$46 million to support a multi-agency effort to attack independent contractor misclassification. Among the participating agencies are the Wage and Hour Division (WHD), the Office of Federal Contract Compliance Claims (OFCCP), and the Occupational Safety and Health Administration (OSHA).

The DOL's budget request underscores the fact that identifying and eradicating the misclassification of employees as independent contractors continues to be a significant policy objective for the agency, and serves to put employers on notice that they fail to correctly classify employees at their peril. Indeed, the latest budget initiative follows recent WHD efforts to hire 250 new wage and hour investigators, as well as the DOL's efforts to create a joint Labor-Treasury misclassification initiative focused on detecting, investigating, and prosecuting employers with misclassified workers.

Unemployment Insurance Program Component

Employers do not make contributions to unemployment insurance funds for individuals misclassified as independent contractors. It is not uncommon, however, for individuals classified as contractors to apply for unemployment benefits usually available only to unemployed former employees. To address this issue, the DOL's budget initiative includes a dual-pronged approach ultimately designed to increase employer contributions to unemployment insurance programs.

First, the budget initiative encourages states to compete for grants that would encourage improved enforcement by increasing states' capacity to participate in data-sharing activities with the IRS, as well as other federal and state agencies. Second, the initiative seeks to create a high-performance award program to incentivize states to improve misclassification prevention efforts, offering a monetary award or "high-performance bonus" to those states that are most successful in exposing misclassification.

Multi-Agency Investigative Component

The 2012 proposed budget also includes a new multi-agency misclassification initiative to improve and coordinate federal and state efforts to enforce labor violations resulting from the misclassification of employees as independent contractors, and to deter future

classification violations. The DOL is requesting an additional 107 full-time WHD positions to support field-investigator training activities, as well as an anticipated 3,250 additional misclassification investigations. The DOL also intends to allocate additional funds to other agencies, including OSHA and OFCCP, to permit them to include contractor misclassification as a part of their investigations and to share such data with other agencies, such as the WHD.

Worker Misclassification Penalties

As most employers know, an employer that has misclassified an employee as an independent contractor risks numerous potential claims, including: (1) tax claims (state, federal, and FICA); (2) wage (e.g., overtime), indemnification, and benefit claims; (3) claims for civil penalties, including penalties for failing to withhold taxes or to pay final wages, or failing to provide itemized wage statements; (4) unanticipated tort claims to third parties and wrongful discharge claims; and (5) criminal investigations and possible claims.

How Should Employers Respond?

Whether the DOL's budget proposal will be funded in the current political and budget deficit environment is uncertain. What is clear, however, is the DOL's continued focus on searching for independent contractor misclassification. With or without additional

Continued on page 2...

Feds Target Independent Contractor . . .

Continued from page 1...

resources, the DOL has underscored its intent to identify employers that engage in intentional or accidental misclassification and do what is necessary to rectify the situation, including sharing misclassification information with other interested government agencies. In light of the DOL's intensified efforts to unearth and penalize worker misclassification by employers, as well as the legal complexity of employee/independent contractor classification analysis, employers would do well to proactively assess the accuracy of their worker classifications and, where necessary, take corrective measures.

If you have any questions regarding independent contractor classification, rectifying misclassification, establishing a protocol to promote proper classification decisions, or assessing potential liability relating to improper classification of one or more independent contractors, please consult a member of Wilson Sonsini Goodrich & Rosati's employment law practice.



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