

## **New Penalties for Misclassifying Workers**

June 1, 2010

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On April 22, 2010, identical bills (H.R. 5107 and S. 3254) entitled the Employee Misclassification Prevention Act ("EMPA") were presented to both houses of Congress. These bills amend portions of the Fair Labor Standards Act ("FLSA") to combat employers' misclassification of workers as independent contractors rather than employees, thereby avoiding protections and benefits only granted to employees, such as minimum wage laws, overtime compensation, employment discrimination laws, unemployment insurance and workers' compensation. The bills were presented by Rep. Lynn Woolsey of California in the House and Senator Sherrod Brown of Ohio in the Senate. Both bills have been referred to their respective committees.

If passed, the EMPA will impose the following changes to the FLSA:

- Employers will be penalized for misclassifying workers as independent contractors when they should have been characterized as employees;
- Employers will be responsible for keeping records on whether each worker has been classified as an employee or a non-employee (independent contractor). Previously, employers were only required to keep records pertaining to employees, but not independent contractors;
- Employers must give notice to each worker of his or her classification and provide the worker with access to information about the rights only granted to employees and directing the worker to the Department of Labor for more information; and
- If the employer fails to properly keep records on the worker's classification or fails to give the worker proper notice of his or her employment classification, the worker is presumed to be an employee and thus entitled to all of the protections and benefits granted to employees. This presumption can only be overcome by clear and convincing evidence that the worker is a non-employee.

The EMPA also adds an anti-retaliation provision prohibiting employers from discharging or discriminating against workers for:

1. opposing any practice or instituting proceedings concerning the worker's status as an employee or non-employee;
2. testifying in any proceeding concerning the worker's status as an employee or non-employee; or
3. serving on an industry committee.

If the employer misclassifies a worker, fails to give notice to the worker of his or her classification or fails to meet its recordkeeping requirements, the employer faces a fine of up to \$1,100 for each worker who was the subject of the violation. If the employer repeatedly or willfully makes the same violation, the employer faces a penalty of up to \$5,000 for each worker who was the subject of the violation.

The EMPA also directs the Department of Labor to create a new website that informs workers of the greater rights afforded to employees and providing a link for workers to file complaints online. The Department of

Labor is directed to perform targeted audits of “certain industries with frequent incidence of misclassifying employees as non-employees.”

The EMPA also imposes additional mandates upon state agencies. In order to be eligible for federal unemployment compensation grants, the EMPA directs state unemployment agencies to conduct audits to find employers who are misclassifying workers and, thus, preventing workers from receiving unemployment compensation. The states are required to file quarterly reports with the Secretary of Labor describing the results of the audits. The EMPA also directs state agencies to establish administrative penalties for the misclassification of employees.

In 2008, similar bills died in committee without reaching a floor vote.