

Employment Bulletin - February 5, 2010

February 5, 2010

OBAMA ADMINISTRATION PROPOSES INITIATIVE TO COMBAT MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS

written by [Lyndsey M. Kruzer](#)

President Obama's proposed federal budget for the 2011 fiscal year highlights one of its key enforcement priorities - to fight the misclassification of employees as independent contractors. The proposed budget for the Department of Labor includes a \$25 million "Misclassification Initiative", which is intended to assist the Department in identifying and reducing employee misclassification. If passed, the initiative would allow the DOL to hire additional investigators and enforcement personnel and would create competitive grants to encourage the states to address the issue. From the Administration's perspective, employers who misclassify employees as independent contractors gain potentially unfair tax and other financial advantages and deny employees the protections of many federal labor and employment laws. The DOL believes that greater enforcement measures are needed because it perceives employees as being particularly vulnerable to misclassification in the current economic climate.

This budget initiative is only the latest reason why employers should think carefully before classifying an individual as an independent contractor rather than as an employee. There is no single legal test for determining whether an individual is an employee or an independent contractor, and, as a result, an individual could be an independent contractor for some purposes, such as under the IRS rules, but an employee under other laws. For example, in Massachusetts, individuals are presumed to be employees for purposes of the wage and hour laws, and an employer must satisfy a stringent test to establish independent contractor status.

Further, the risks of misclassification are significant. Employers could face claims for unpaid overtime or the failure to pay the minimum wage rate under both federal and state law. Penalties for such violations include both civil and criminal sanctions. Employers also may owe back payroll taxes and other government penalties. Employers may become the targets of civil litigation by the individuals for unpaid wages and benefits.

While misclassification has been a significant issue in Massachusetts over the past few years, the new budget initiative demonstrates that the federal government also intends to scrutinize the classification of individuals as independent contractors. At a minimum, employers who utilize independent contractors should evaluate the relationship carefully to ensure that such classification remains appropriate under both federal and state law.