Employment Law

October 12, 2011

Independent Contractor or Employee? New California Law Raises the Stakes

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On October 9, 2011, Governor Brown signed new legislation designed to crack down on the misclassification of employees as independent contractors. SB 459 revises the Labor Code to add section 226.8, which deems it unlawful to engage in "willful misclassification of an individual as an independent contractor."

"Willful misclassification" for purposes of the law means "voluntarily and knowingly misclassifying" individuals as independent contractors when they should be treated as employees. In addition, the provision makes it unlawful for an employer to charge a misclassified individual fees for items that employees are not normally required to purchase, such as space rental, services, or equipment. Finally, Labor Code section 2753 imposes joint and several liability on any person who, for money or other valuable consideration, knowingly advises the employer to avoid employee status by treating the individual as an independent contractor. Lawyers advising their clients and individuals making recommendations to their own employer are exempt from liability under this section.

Employers found to have violated Labor Code section 226.8 could face significant penalties, disciplinary measures, and potential liability. First, an employer could be subject to civil penalties between $5,000 and $15,000 per violation, or if the employer were found to engage in a pattern and practice of violations, between $10,000 and $25,000 per violation. Furthermore, an employer found to have violated this provision would be ordered to post on its website (or, if the employer has none, in a prominent location) a notice stating that the employer committed a "serious violation of the law." Among other requirements, the notice must be posted for a year and invite aggrieved individuals to contact the Labor and Workforce Development Agency.

Because the Labor Commissioner is empowered with enforcing the law, it is likely that aggrieved employees could bring representative actions under the Private Attorneys General Act. Such enforcement actions would likely seek not only the civil penalties described above but also penalties for other lost benefits associated with employment, such as overtime pay, minimum wage, health and vacation benefits.

Recommendation

Employers should be proactive about reexamining worker classifications. Because the potential liability has increased and the degree of knowledge required for a "willful misclassification" is uncertain, employers should contact experienced employment counsel before classifying or reclassifying employees.

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