California Teams with the U.S. Department of Labor to Combat Worker Misclassification

California employers have one more reason to make sure they are not misclassifying workers as independent contractors. Last week, the California Labor Commissioner announced that her agency has entered a new Memorandum of Understanding to partner with the United States Department of Labor to combat what both agencies describe as the growing problem of worker misclassification. As we have previously reported, the Department of Labor has stepped up its efforts to address the worker misclassification issue and has also recently partnered with the Internal Revenue Service on increased enforcement.

In announcing the new partnership with the federal Department of Labor, the California Labor Commissioner referenced Senate Bill 459, which took effect on January 1, 2012, and amends the Labor Code to create civil penalties for misclassifying workers as independent contractors. The civil penalties range from $5,000 to $15,000 per violation and can increase to as much as $25,000, if the employer is found to have engaged in a pattern and practice of willful misclassification. While employers have always faced the possibility of wage and hour liability as well as tax liability for misclassifying workers as independent contractors, Senate Bill 459 introduced additional civil penalties and signals California's focus on increased enforcement.

Because it is abundantly clear California and federal agencies are increasing enforcement efforts, employers would be well-served to review their relationships with independent contractors to make sure those independent contractors are not actually employees. Many employers are using new staffing models that obscure or eliminate the employment relationship with workers. These new staffing models are not inherently at odds with the law, but, they can lead to confusion about the nature of the relationship between the person providing services and the entity receiving those services.

Employers should review all of the relationships that the employer currently characterizes as an independent contractor relationship to make sure it meets the legal test. The fact that both parties describe the relationship as that of an independent contractor in a signed agreement is not enough. Employers should examine the relationship to determine whether there are any "indicia of employment." Indicia of employment include, for example, controlling the individual's performance of work, dictating the time, manner or place that the individual performs the work, and whether the workers are held out to the outside world as employees of the company by virtue of business cards or email addresses.

As we have discussed many times in these Alerts, improper classification of workers creates significant economic risk for employers from IRS audits, Department of Labor investigations and their California counterparts.

If you have any questions about worker classification, or any other employment related issues, please contact one of our attorneys:

Daniel F. Pyne III
Richard M. Noack
Ernest M. Malaspina
Karen Reinhold
Erik P. Khoobyarian
Shirley Jackson