EMPLOYMENT LAW UPDATE

I'll See Your "EMPA" and Raise You a "TRACA". What's the Deal with the Proposed Wage & Hour Legislation?

By Gregory D. Stobbe, J.D., SPHR

The Obama Administration has estimated that employers who have misclassified workers as "independent contractors" rather than "employees", has cost the government upwards of $350 billion in lost tax revenue. Legislative efforts to uncover and remediate these misclassifications are well underway, with a projected recoupment of $7 billion over the next ten years. Towards this end, $25 million of the 2011 federal budget has been earmarked specifically to address this one issue on a nationwide level. Spend a little - recoup a lot - not a bad investment strategy.

The "Employee Misclassification Prevention Act" (EMPA) and the "Taxpayer Responsibility, Accountability and Consistency Act," (TRACA), are both pieces of federal legislation introduced in 2010 and 2009, respectively. EMPA proposes to amend both the FLSA and Social Security Act by requiring employers to greatly broaden their record keeping requirements for both independent contractors and employees alike. The purpose here is to provide greater "transparency" of the employer's decision making process when classifying workers. Under this proposal, employers would be required to initiate and maintain a written "decision" audit trail (available for inspection) for each worker (independent contractors and employees alike). Employers would also be required to proactively provide this information to workers in the form of a notice. Under TRACA, among the additional burdens and costs to employers, would be a significant increase in the penalties associated with filing tax returns with incorrect information regarding an individual's employment status.

So we have Congress, the Judicial System, DOL, IRS, Organized Labor, Workers and Employers, all sitting at the table and of course the Administration is dealing. Supreme Court Justice Sonia Sotomayor, perhaps showed one of her cards when she was previously sitting on a U.S. Court of Appeals. In a decision there, she sided with the majority which found a doctor to be potentially misclassified as an independent contractor. No big deal, right? Wrong. Keep in mind, that if found to be an employee, the employer/hospital could be liable for any discrimination the doctor may have been subject to in connection with her position. A right not generally afforded to an independent contractor.

If passed, this legislation would subject employers to additional "bad hands" (read "penalties") too numerous to list here. To avoid the possible risk exposure of "holding" their cards for too long, prudent employers may wish to consult an expert. Any audit of an employer's worker classification system should ideally be conducted with the advice and assistance of experienced employment law counsel. Counsel can work to ensure that the results of the audit will be considered privileged, should the employer's compensation and classification procedures be challenged. Of course, there is always waiting too long and folding.

Stay tuned…