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Legal ALERT!

Employee Misclassification Prevention Legislation Introduced

Both the U.S. House and Senate recently introduced legislation aimed at curtailing workers from being misclassified as independent contractors. Specifically, the Employee Misclassification Prevention Act (EMPA), introduced on April 22, 2010, would amend the Fair Labor Standards Act (FLSA) to impose significant additional compliance and record-keeping requirements on employers and to explicitly prohibit the misclassification of employees.

According to Sen. Sherrod Brown (D-Ohio), who introduced the Senate bill, "tens of thousands of employers" misclassify their employees as independent contractors, and as a result, these workers are not eligible for benefits such as minimum wage and overtime, unemployment insurance, and workers' compensation. Misclassified workers are also not protected by anti-discrimination and health and safety laws.

The proposed legislation comes amidst an ongoing initiative by several federal agencies, including the U.S. Department of Labor (DOL), to "crack down" on the misclassification of employees as independent contractors. Indeed, the DOL has spent millions to hire new Wage and Hour Division (WHD) investigators, reportedly over 250, to target employee misclassifications.

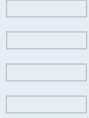
In addition, the DOL recently published its semiannual agenda of regulations that have been selected for review or development during the coming year, and one of the proposed rules would drastically change the FLSA's recording-keeping requirements. As set forth in the WHD Fact Sheet, in order to promote transparency, the proposed rule would require "[a]ny employers that seek to exclude workers from the FLSA's coverage ... to perform a classification analysis, disclose that analysis to the worker, and retain that analysis to give to WHD enforcement personnel who might request it."

The EMPA proposes to reduce the number of employee misclassifications by:

- Ensuring that employers keep records that reflect the accurate status of each worker as an employee or non-employee and clarifying that employers violate the FLSA when they misclassify workers.
- Requiring employers to keep records, similar to the work and wage records kept for employees, for each contractor hired.

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- Requiring employers to notify workers of their classification as an employee or non-employee.
- Increasing penalties on employers who misclassify their employees and are found to have violated employees' overtime or minimum wage rights.
- Creating an "employee rights website" to inform workers about their federal and state wage and hour rights.
- Providing protections to workers who are discriminated against because they have sought to be accurately classified.

Notice Rules

In particular, under the Act, employers would have six months from the bill's effective date to notify current employees and contractors of their classification. Future workers would be informed of their status at the time of hire. If employers fail to comply with these notice requirements, workers would be presumed to be employees unless the employer showed clear and convincing contrary evidence.

Fines

The Act also sets civil penalties of up to \$5,000 per violation for employers that do not comply with the notice and record-keeping requirements, as well as for employers that misclassify employees. Willful violations of the FLSA that occur via the misclassification of employees would be subject to triple damages.

Enforcement

The EMPA further intends to improve federal and state efforts to detect and stop misclassification by enhancing enforcement efforts, including:

- Mandating that states conduct audits to identify employers who misclassify workers and requiring that DOL monitor states' efforts to identify misclassification.
- Directing states to strengthen their own penalties for worker misclassification.
- Permitting DOL and IRS to refer incidents of misclassification to one another.
- Directing DOL to perform targeted audits focusing on employers in industries that frequently misclassify employees.

Employers should periodically review their employee classification policies and practices with a critical eye to ensure that they are consistent with applicable federal and state laws and regulations and to confirm their employees and independent contractors are being properly classified. As this area of law rapidly evolves, Hiscock & Barclay, LLP will continue to monitor recent legislative, regulatory and enforcement activity to help its clients stay up-to-date on key developments. ■

If you have any questions or require our assistance in reviewing your policies or conducting management training, please contact the Hiscock & Barclay lawyer with whom you normally work or any attorney in our Labor & Employment practice area.