

Employment News Alert

August NewsFlash

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INDEPENDENT CONTRACTORS

Does The Government See Them As "Employees" Or As "Dollar Signs"?

Whether it be the IRS, the U.S. Dept. of Labor (DOL), or any number of our individual state's labor departments, the title question above is a valid one to make right now. The Great Recession with its losses of millions of jobs, as well as its aftermath with the nation's stubbornly high unemployment numbers continuing today and the looming threat of a "double dip" has prompted government to take an even closer look at how private employers are classifying their workers. But are they looking at these classifications as a way to protect workers or as a means to generate additional revenue in the form of penalties, interest, and back taxes against employers who have misclassified? In other words, are they employees or are they just "dollar signs"?

We know this is no surprise to executives and HR managers in New Jersey, especially those who receive the *NewsFlash*, as we first warned back in October 2009 of the DOL's plan to step up its audit and enforcement activities in worker classifications and potential wage/hour violations. As we previously reported at ENA, many of the workers laid off in the last two years who have recently found work in New Jersey have been re-hired by their former employers -- the difference now, of course, is that many have been re-hired as temps, freelancers, or independent contractors.

As any manager can tell you, there are significant payroll savings to the Company when classifying workers as independent contractors, rather than as employees. As an example, there is no requirement for tax withholdings or to pay payroll taxes for independent contractors; no requirement to contribute to state unemployment funds or to pay workers' compensation insurance for them; and no requirement to offer health insurance or other such benefits to them. For a company looking to stay lean and competitive, *and profitable*, it makes perfect sense to look at independent contractors for its hiring needs.

The DOL's point of view, and that of the IRS as well, is decidedly different. There are a number of reasons why government has recently heightened its interest in worker misclassification. First and foremost is the same reason why private employers choose to hire independent contractors rather than employees -- which is that companies generally do not have to withhold or pay payroll taxes, including Social Security (FICA) taxes and unemployment (FUTA) taxes, for independent contractors. Rather, it is the contractor's responsibility to pay these taxes, the compliance of which is apparently overwhelming the IRS as millions of workers have been classified as contractors.

HOW TO CLASSIFY YOUR WORKERS

The biggest problem with classification is that many workers identified as independent contractors do not meet the legal tests to qualify as such. Notice we said *tests*, not test í which leads us to another significant problem confronting employers today on this issue. There is no single uniform test to apply to determine whether a worker is an employee or a contractor, but rather a multitude of tests.

To add to the confusion, there are different tests to determine classification based on the specific law at issue. The FLSA has one test, entirely different from that used under Title VII. To ensure proper classification as part of your litigation avoidance policy, review all of your independent contractor and consultants agreements.

What ENA can offer, however, are these general guidelines:

1. **LIMIT CONTROL:** limit your control over the worker and the work -- the more you control the òwhen, where, and howö, the more your contractor becomes your employee.
2. **LIMIT DURATION:** limit the length of the contract for which the worker was hired -- the longer the term, the more likely an audit will say they are an employee. Your initial contract should provide for extensions.
3. **BE SPECIFIC:** be specific about the financial terms in the contract, ensuring the contractor is responsible for all tax reporting obligations.
4. **BE SPECIFIC:** be specific about the nature of the project for which the contractor has been hired -- the more specialized their skill, the more likely they have contractor status.
5. **INQUIRE:** determine whether the contractor is essentially working full-time for your company -- if so, employee status is more likely. Obtain disclosures from the contractor and ensure the initial contract specifies regular disclosure updates.

WHAT CAN YOUR COMPANY DO RIGHT NOW?

As is typical in the ever-changing area of employment law in New Jersey, there are multiple, sometimes conflicting, laws to be interpreted and applied to the workplace. The trick for HR right now is to ensure that flexibility and the "competitive edge" stays with their company ó stay ahead of the curve.

If your company is currently hiring contract workers, be sure to classify them correctly. An incorrect classification, even as an innocent mistake, can result in significant fines, penalties, and back taxes.

We have the expertise to help you review your procurement procedures and contracts and to implement the right policies to address these issues so as to minimize your Company's exposure to this new potential threat.

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