

CLIENT ALERT

STATE LABOR DEPARTMENT TARGETS PROFESSIONAL PRACTICES AND BUSINESS ENTITIES FOR AUDITS

A large number of medical practices and small businesses are reeling from fines and penalties resulting from New York State Labor Department audits. In September, 2007, an interagency strike force was formed in New York to address the problem of employers who inappropriately classify employees as independent contractors, or pay workers off the books. The net has widened since then, to include even criminal prosecutions of businesses that fail to pay employees what is required by law.

Aside from the strike force, labor department audits can also result from a fired worker seeking unemployment benefits, or an injured worker seeking worker's compensation. These workers often advocate that the employer treat them as independent contractors. Then, when they are injured or unemployed, they change their tune to claim that they were, instead, employees.

Regardless of the reason for a Labor Department audit, the consequences can be devastating. This is because improperly classifying an employee as an independent contractor exposes the business to liability not only for unpaid unemployment contributions, but also for worker's compensation and FICA and FUTA contributions, as well as fines and penalties. One employer, for example, faced over a million dollars of penalties claimed by the IRS, as a result of a New York State Labor Department determination that seven of its sales representatives were actually employees, rather than independent contractors as they were classified.

More limited exposure exists when employers label employees as "salaried" despite their job duties and earnings. Only employees who perform certain administrative, executive or professional duties (and several other limited exceptions) are exempt from overtime and minimum wage requirements. In order to be exempt, most employees must be paid on a salaried basis and meet income requirements imposed by both New York State and the federal government.

The New York State Labor Department can collect back wages for six years, unlike the Federal government, which can collect for a shorter period of time.

Businesses can and should do something about this exposure. Here are some suggestions:

- Audit the work force to determine if you have properly classified workers as independent contractors. If you exercise control over how the worker performs the job, it is likely that the worker will be deemed to be an employee, rather than an independent contractor.
- Audit the work force to determine if employees you view as management or exempt, meet the tests for exemption set forth in state and federal laws.
- Make sure that your documentation supports that you are treating a worker as an independent contractor and that the tests to be classified as a contractor are met. For example, draft a contract. Review what materials and equipment are provided to the contractor. Make sure that you do not restrict the contractor from working for other businesses.
- Perform the same tests on an employee you believe to be exempt from the overtime and minimum wage laws. Review the employee's *actual* duties, whether the employee is being paid on a salaried basis, and whether the employee has been paid the necessary minimum salary. Make sure that there are no deductions from wages for less than full day absences, unless permitted by law.

These are just some of the ways that a business can minimize its exposure to crippling back pay awards, and fines and penalties. The bottom line is that many businesses are either inadvertently, or as a cost saving measure, exposing themselves to substantial liability. We can help prevent this exposure by advising you about the legal requirements, helping you to conduct your own audit before the Labor Department conducts one for you, and making sure that your procedures and documents are in order.

For more information on this or other employment-related issues, please contact Sharon Stiller, Esq.; Scott Simpson, Esq.; or your attorney contact at our firm. Thanks.

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