



## **Worker Misclassification May Become Even More Costly to Employers**

Legislative efforts are underway to better enforce labor laws and strengthen requirements and penalties for setting up workers as independent contractors rather than employees. First, a proposed amendment to the Fair Labor Standards Act (FLSA) recordkeeping regulations is intended to foster openness and transparency, increase awareness among workers, and encourage greater compliance by employers. Next, the proposed **Employee Misclassification Prevention Act** seeks to strengthen requirements and penalties to employers for setting up workers as independent contractors rather than as employees.

### **Amendments to the Fair Labor Standards Act (FLSA) Recordkeeping Regulations**

The current recordkeeping regulations require covered employers to keep specified payroll records and other information, but do not require that such information or other information regarding a worker's employment or exemption status be disclosed to the worker. This is an issue of transparency and is critical to workers' understanding of their legal rights and responsibilities.

Under the proposed recordkeeping regulations, any employers that seek to exclude workers from the FLSA's coverage will be required by the Wage & Hour Division (WHD) of the Department of Labor to:

- Perform a classification analysis
- Disclose that analysis to the worker, and
- Retain that analysis for provision to WHD enforcement personnel upon request

The proposed regulations will also address:

- Burdens of proof when employers fail to comply with records and notice requirements.
- Modernizing certain recordkeeping requirements for live-in domestic employees and persons considered industrial home workers under the FLSA.
- Allowing alternative methods of accurately recording hours worked instead of the mandatory paper records currently required for employees working under such arrangements.

This proposed change in the regulations is purely administrative and **requires no Congressional action.** Publication in the Federal Register followed by a response period for comments has yet to take place. Therefore, implementation and enforcement **could be as early as January 2011** or may be pushed back to late next year if it faces enough opposition.

### **Employee Misclassification Prevention Act**

***“Worker misclassification actually describes workers being illegally deprived of labor and employment law protections, as well as public benefits programs like unemployment insurance and workers' compensation because such programs generally apply only to “employees” rather than workers in general. Worker misclassification occurs when a worker who is legally an employee is treated as a self-employed worker, often referred to as an “independent contractor.”***

***Seth Harris, Deputy Secretary of the Department of Labor – comments made during June 17, 2010 statement before the U.S. Senate Committee on Health, Education, Labor and Pensions***

In simple terms, **employee misclassification is the practice of treating a worker who is an employee under the law as something other than an employee, thus depriving the employee of rights and benefits to which they are entitled.** As part of its ongoing efforts against misclassification The Department of Labor (DOL) has introduced new legislation under S. 3254, the "Employee Misclassification Prevention Act" (EMPA). Its impact on employers will be significant because:

1. EMPA would make misclassification a violation of the FLSA, thus providing employers with an important additional incentive to properly determine whether a worker is an "employee."
2. EMPA would codify in the FLSA an employer's obligation to provide their workers with notice of how the worker is classified. If an employer fails to give this notice, EMPA establishes a legal presumption that the worker is an "employee."
3. EMPA provision that authorizes WHD to seek Civil Monetary Penalties for recordkeeping violations provides an important enforcement tool not only against misclassification, but against all FLSA recordkeeping violations.

Before declaring that a worker is not an "employee" under the FLSA, employers would not only be required to perform a written analysis of the worker's status applying the "economic realities test," but also be required to disclose the analysis to the affected worker, and keep a record of the analysis in their files for review should a Wage & Hour investigator seek this information.

An enforcement emphasis has been placed on employee misclassification, with all new WHD investigators being trained on how to determine workers' employment status and to ensure they have been classified properly. These actions have the full support of the current administration, as evidenced by statements such as:

- **Are you concerned about the level of regulatory and financial risk your organization may be facing due to misclassified workers?**
- **Are you confident that individuals classified as “independent contractors” in your organization pass the economic realities test under DOL guidelines?**

Please contact **Jeff Green, PROXUS Principal** at **215-654-9140 ext. 102** or [jgreen@proxushr.com](mailto:jgreen@proxushr.com) to discuss your concerns and / or to obtain additional information on these important issues.

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