Proposed "Independent Misclassification" Law

Insights
2.03.14

Government efforts aimed at cracking down on perceived independent-contractor misclassification show no signs of slowing down as 2014 begins. On November 12, 2013, the "Payroll Fraud Prevention Act of 2013" (PFPA) was introduced in the U.S. Senate. According to one of the bill's cosponsors, the bill is needed to reduce "intentional misclassification" which amounted to "payroll fraud." The bill would make it a freestanding violation of the federal Fair Labor Standards Act (FLSA) to wrongly classify an employee as a non-employee.

While the cosponsor stressed that it was an effort to penalize and prevent "*intentional* misclassification" – and not an effort to point fingers at companies that are following the law – its provisions make little effort to distinguish between willful and good-faith misclassification.

Take (And Give) Notice
PFPA would require that an employer both accurately classify a worker as being either an employee or a "non-employee" *and* give the worker written notice of this classification. But your obligation to provide notice does not stop once you inform workers that they have been classified as an employee or non-employee. In addition, the notice must direct workers to a U.S. Labor Department website for further information about their legal rights, and include the address and telephone number of the local U.S. DOL office so that workers can contact the DOL if workers suspect that they have been misclassified.

The first required notices would be due to new employees and non-employees alike within six months after PFPA's enactment.

New Penalties
Under the bill, if wrongly classifying an employee as a non-employee results in FLSA minimum-wage or overtime underpayments, then the additional, equal amount normally imposed as FLSA liquidated damages for those violations would itself be doubled. Moreover, the bill provides for a civil money penalty of up to $1,100 for each affected individual. For "willful or repeated" violations, the penalty would rise to $5,000 per occurrence. Thus while the bill penalizes intentional or willful violations more severely, good-faith violations would also result in civil money penalties.

The bill creates an additional penalty where an employer fails to provide the required notice to an employee or non-employee. Upon such failure, the worker would be presumed to be an employee and the presumption could be rebutted only through the clear and convincing evidence that a

and the presumption could be rebutted only through the clear and convincing evidence that a covered individual is not an employee. The penalty applies regardless of whether an employer acts willfully or not, and would surely prove to be a significant obstacle to an employer's ability to prevail on the merits in any independent-contractor misclassification lawsuit.

Whether or not PFPA is enacted, the bill demonstrates that the perceived independent misclassification "problem" is not going away and neither are government efforts to crack down on the problem. This is true at both the federal and state level. For example, in November 2013, New York became the latest state to partner with U.S. DOL in order to share information and coordinate investigations into such misclassifications. The DOL now has such agreements with 15 different states and it seems likely that more will follow.

How Employers Should Respond

Employers should monitor PFPA and all government initiatives that are aimed at cracking down on independent-contractor misclassification. This is particularly true for those employers that rely on independent contractors, as many healthcare employers do. A provision within the PFPA would direct USDOL to conduct targeted audits of employers within "certain" industries with frequent incidence of misclassifying employees as nonemployees.

While it is not clear from the bill what exactly constitutes "frequent incidence" in this context, the bill would give the Labor Secretary the authority to make that determination. Moreover, there is at least some anecdotal evidence that the healthcare industry could be a candidate for such targeted audits. On November 20, 2013, DOL announced that it had filed a lawsuit against an Ohio-based home healthcare company for allegedly misclassifying current and former employees as independent contractors and failing to pay them for all hours worked.

With the beginning of a new year, healthcare employers should review their relationships with independent contractors and assess whether the actual circumstances of the relationship support the classification that the parties have given it.

For more information, contact the author at TBoehm@fisherphillips.com or 404.231.1400.

Related People

Ted Boehm
Partner
404.240.4286
Email