Senate "Misclassification" Bill Bears Watching

Insights
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Yet another "misclassification" bill introduced in the U.S. Senate would impose new prohibitions, requirements, and penalties relating to categorizing a worker as being either an employee or a non-employee. The "Payroll Fraud Prevention Act of 2013" (S. 1687) would among other things make it a *freestanding* violation of the federal Fair Labor Standards Act "to wrongly classify an employee . . . as a non-employee . . .."

Formal Classification, Mandatory Notice
PFPA would require that an employer or other person subject to the FLSA both "accurately classify" a worker as being either an employee or a "non-employee" and give the individual written notice of this classification. Absent the notice, a worker would be presumed to be an employee; the presumption could be rebutted only "through the presentation of clear and convincing evidence . . .."

The notice would also have to:

- Direct the individual to a U.S. Labor Department website also provided for in the bill;
- Include the address and telephone number of the local USDOL office; and
- Contain a prescribed rights-related statement.

The first notices would be due within six months after the PFPA's enactment.

If "wrongly classify[ing] an employee . . . as a non-employee" resulted in FLSA minimum-wage and/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 (CMP) of up to $1,100 as to each affected individual; the per-person maximum would rise to $5,000 in the case of a repeated or willful violation. Apparently, these CMPs could be assessed simply because an individual was erroneously classified as a non-employee, because the classification was not done, or because the required notice was not given, without regard to whether any of these things also resulted in an FLSA minimum-wage or overtime violation.

The proposal would direct USDOL to target "certain industries with frequent incidence of misclassifying employees as non-employees . . .."

Broader Penalty Changes Also

As was the case with similar 2010 bills, S. 1687 would represent a significant expansion of FLSA CMPs in ways not confined to the "misclassification" arena.

The FLSA currently permits USDOL to impose CMPs of up to $1,100 for each *repeated* or *willful* violation of the minimum-wage or overtime provisions. But under S. 1687, per-person penalties of this magnitude could be imposed for violations that are *neither* repeated *nor* willful. If violations were repeated or willful, then the per-person ceiling would jump to $5,000. These penalties could be asserted irrespective of whether the violations were "misclassification"-related.

FLSA CMPs would for the first time also apply to stand-alone violations of USDOL's recordkeeping requirements. Enforcement officials have long had this on their "wish list" of FLSA revisions. We have commented previously about how such a seemingly-innocuous change could have sweeping ramifications.

The Bottom Line

Employers would be wise to keep an eye on S. 1687. Its significance is obvious for organizations whose workforces include "contract laborers", "freelancers", "casual workers", "contract employees", or independent contractors by any other name. But even employers outside of this sphere should be troubled by the prospects for potentially draconian CMPs.