



Increasing Risk Of "Independent Contractor" Challenges (Updated 05/24/10)

Insights

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If your organization's operational model includes an "independent contractor" contingent, it is more important than ever to ensure that this status can be successfully defended. Enforcement officials are gearing up to challenge the classification across a variety of fronts.

Efforts continue at the federal and state levels to pass new laws affecting whether and when independent-contractor status will be valid. But a leading indicator of things to come appears in the U.S. Labor Department's [FY 2011 budget report](#).

In the Labor Department's view, misclassifying individuals as independent contractors "denie[s] access to critical benefits and protections to which they may be entitled as regular employees" and "generates substantial losses to the Treasury and the Social Security, Medicare and Unemployment Insurance Trust Funds." The Labor Department seeks "a joint Labor-Treasury initiative to strengthen and coordinate Federal and State efforts to enforce statutory prohibitions, [and to] identify, and deter misclassification of employees as independent contractors."

The Labor Department plans targeted investigations and stepped-up litigation. It also envisions competitive grants made to states for similar initiatives which are designed to "reward the States that are most successful at detecting and prosecuting employers that fail to pay their fair share of taxes due to misclassification." The Labor Department also favors legislation that would compel employers to prove that independent contractors are classified correctly and would impose federal Fair Labor Standards Act penalties for misclassifying workers.

The FLSA definition of "employee" has been characterized as the broadest of all federal employment laws. What a worker is called, whether he or she would be considered an employee under other laws (like tax laws), and whether the individual has signed an independent-contractor agreement do not in themselves determine whether the person is truly an independent contractor for FLSA purposes. Relevant questions include these:

- Are the individual's services an integral part of the organization's activities?
- Does the individual have any significant investment in facilities or equipment?
- Does the individual have an opportunity for profit and loss other than just working hard?
- Does the individual exercise a businessperson's initiative, judgment, or foresight?

- Is the relationship permanent or indefinite, rather than for a determinable time?
- Does the individual have meaningful and predominant control over the work's details?

If the answers leave you feeling uncertain about the status of your independent contractors, it's time to take a hard look at things.

UPDATE 05/24/10: Fisher Phillips recently published an article on this topic in the Bureau of National Affairs *Daily Labor Report*. Click below to read the article.

[Misclassification Article 05 20 10.PDF \(62.50 kb\)](#)