New Colorado Law Clamps Down on Employers Who Misclassify Workers

Insights
6.04.09

On June 2, 2009, Governor Ritter signed into law H.B. 1310 paving the way for any person to file complaints with the Colorado Department of Labor and Employment ("CDOLE") asserting that an employer has improperly classified an employee as an independent contractor. The new law became effective immediately and imposes a fine of $5,000 per misclassified employee, which could jump to $25,000 for a second or subsequent offense. Additionally, repeat offenders could be barred from contracting with the state for up to two years.

Of course, improper classification of independent contractors continues to leave companies exposed to back tax liability at the state and federal level. Moreover, companies that get it wrong may be subject to employment-related claims of discrimination, wrongful discharge, minimum wage and overtime violations, and violations of the Colorado Wage Claim Act, just to name a few.

The new law follows on the heels of stepped-up audits and investigations by the CDOLE focusing on whether Colorado companies properly are classifying individuals as independent contractors versus employees. Specifically, the Divisions of Workers' Compensation and Unemployment Compensation increasingly have been scrutinizing how Colorado companies classify and use independent contractors.

The Director of the Division of Employment and Training is vested with the authority to enforce H.B. 1310, including the authority to investigate complaints, impose fines, and disbar state contractors. To do so, the Director must find that there has been "willful disregard" of the new law. Good faith mistakes are not likely to trigger such fines and penalties. That said, Colorado companies will be under increasing pressure to get it right, meaning that classifying workers or service providers as independent contractors needs to be absolutely correct.

Another important feature of the new law is the section on compliance. Companies may request a written advisory opinion from the Director as to whether an individual should be classified as an employee or independent contractor. The Director has been delegated the authority to make rules and regulations for issuing such opinions.

The good news is that the tests for independent contractor status remain unchanged. The multi-factor tests under Colorado law continue to require a written agreement between the company and

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its independent contractors containing all of the requirements of the Workers' and Unemployment Compensation Statutes. Other important items in the independent contractor checklist include the lack of direction and control over the contractor, the ability of the contractor to provide its services to unrelated third parties (it helps immensely if they actually provide those services), whether the contractor is an entity or individual, the method and reporting of payment for services rendered, and whether the contractor uses its own equipment and office space.

This Legal Alert provides highlights of a particular new law. It is not intended to be, and should not be construed as, legal advice for any particular situation.

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