

New York Employer Alert

October 2011

IRS AND LABOR DEPARTMENT AIM TO REDUCE EMPLOYEE MISCLASSIFICATION

The Department of Labor (“DOL”) and Internal Revenue Service (“IRS”) have teamed up and issued a warning to employers: classify your workers properly or else. New York is one of 11 states participating in a new initiative aimed at significantly reducing employee misclassification through information sharing. This Alert provides you with important information your company needs to avoid common employee misclassification pitfalls.

WHAT IS IT AND WHAT IS ITS PURPOSE?

On September 19, 2011, the IRS and the DOL entered into a Memorandum of Understanding (“MOU”), which is a formal way for the two agencies to coordinate their efforts. The MOU is meant to improve the DOL’s enforcement of federal labor laws by sharing information with the IRS and participating states. Although worker misclassification often results in wage and hour law or Internal Revenue Code violations, the agencies that enforced those laws historically didn’t share information or coordinate their efforts. That’s now changing, because the MOU enables the coordination of law enforcement efforts and increases the government’s ability to identify employers that misclassify their employees, whether intentionally or even by accident.

WHY NOW?

Worker misclassification is a serious issue. The federal government loses billions of dollars every year when employers misclassify employees as independent contractors. How? Independent contractors are ineligible for minimum wage and overtime pay, unemployment insurance, and workers’ compensation and Social Security benefits. Plus, the government doesn’t collect employment taxes on compensation paid to independent contractors. So, if an employee is misclassified as an independent contractor, he or she loses out on valuable protections, and the government loses out on substantial tax revenues.

INDEPENDENT CONTRACTOR OR EMPLOYEE?

Determining whether a worker is an employee or independent contractor isn’t simple. Generally, if an employer has the right to control how the work is to be done, then the worker is an **employee**. If, however, the worker is retained to achieve a certain result while not being limited by the employer with respect to how to accomplish the task, then it can be correct to classify him as an **independent contractor**. There are many factors to consider in making the determination. For example, the worker generally is an employee if the employer:

1. supervises the work,
2. sets the hours,
3. sets the rate of pay,
4. evaluates job performance,
5. requires prior permission for absences,
6. retains the right to hire and fire, and
7. provides facilities, equipment, tools, and supplies.

However, the pendulum swings towards an independent contractor when the worker is free from supervision, direction, or control over the performance of his duties. Some signs that a worker is an independent contractor are that he:

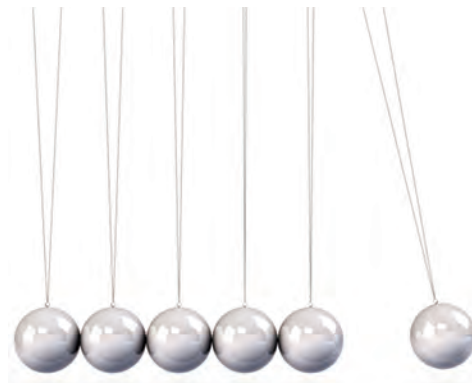
1. has his own business,
2. has business cards other than for your company,
3. advertises,
4. pays his own expenses,
5. sets his own schedule,
6. sets or negotiates his own rate of pay, and
7. may choose to hire his own additional help.

These lists aren’t exhaustive, so employers must examine each situation on a case-by-case basis.

INCREASED LIABILITY

The MOU subjects companies to increased scrutiny from many fronts including the DOL, IRS, and several different state agencies that can initiate enforcement proceedings and litigation against employers that violate the law. Because employee misclassifications can result in the violation of a wide range of laws and frequently involves multiple workers, it can create significant liability. This is especially true for small and mid-size businesses that lack significant financial reserves to defend or settle claims.

Given the risks involved and the attention and resources now being devoted to the issue, companies should ensure that their workers are properly classified. Among other things, this means ensuring that when you classify a worker as an independent contractor, you’re prepared to prove that the classification decision is warranted under relevant laws, including the Fair Labor Standards Act, state wage and hour laws, workers’ compensation statutes, and state and federal tax codes.



WAGE AND HOUR LAND MINES

You may think that you're out of the woods once you properly classify your workers either as independent contractors or employees. Unfortunately, you're only halfway done. Once a worker is identified as an employee, you then have to determine whether he is exempt from the overtime pay laws. Misclassifying employees as exempt from the provisions of the Fair Labor Standards Act and New York State's minimum wage orders is a costly mistake.

All non-exempt employees (that is, those protected by the overtime provisions of the wage and hour laws) must be paid time and a half for all hours over 40 worked in a workweek. A workweek is a period of seven consecutive 24-hour days, and the employer can decide when the workweek starts.

To comply with the law, you have to keep detailed records of the hours that your employees work, because you have to be able to calculate how much overtime, if any, is owed. You also need the records in case you get audited by New York's Department of Labor, so you can demonstrate that you properly paid your employees. If you classify your employees as exempt, it's your burden to prove it.

How do you tell if your employees are exempt or non-exempt? First, you shouldn't rely solely on whether the employee is hourly or salaried. Second, you can't rely solely on the employee's job title.

Rather, you need to assess the **duties** each employee performs and whether he has discretion to make decisions. Moreover, to qualify as exempt under the federal Fair Labor Standards Act, employees have to make a minimum of \$455 per week. New York also has minimum salary requirements that vary by profession.

The law has guidelines for determining which employees are exempt, and, when in doubt, you or your legal team should consult these guidelines before classifying the employees. Most common exemptions are the so called white collar exemptions. Executive, administrative, and professional employees (who, for example, can be CFOs, HR managers, and accountants) generally are exempt employees.

Why should you care? Because the liability can be enormous. If an employee is misclassified, both New York and the federal government can hold you liable for unpaid overtime going back two or three years under federal law and **six years** under New York law as well as for damages and penalties.

With some upfront attention to detail, you can avoid liability for misclassification of employees. Be aware of the manner in which your employees are paid, the hours they work, the duties they perform, and always keep accurate time records.

COPPOLA NAMED WOMAN OF INFLUENCE



Lisa Coppola recently was named a "Woman of Influence" by *Business First of Buffalo*, Buffalo's premier business publication. The awards recognize the business acumen and the community spirit of local female professionals. Coppola was among 24 area women who were honored for their contributions to the community in nine categories. She was cited in the Entrepreneur category that honors women who serve as senior executives in businesses they helped start, build, or significantly grow.

EMPLOYMENT LAW SEMINAR



Kim Georger will be a guest speaker at a November 15th "Employment Law Discrimination Basics" seminar hosted by the University at Buffalo GOLD Group and the Women's Bar Association of New York. It is being held at Pearl Street Grill & Brewery in Buffalo from 4-6 pm with a happy hour to follow. Georger will open the seminar with an overview of employment discrimination law. For more information, contact Kim at 854-3400.

NLRB UPDATE



As we reported in our September 2011 Alert, the NLRB issued a new regulation requiring private sector employers to display new posters by November 14, 2011 advising employees of their rights under the National Labor Relations Act.

Due to an ongoing court challenge, that deadline has been postponed to January 31, 2012. The posters are now available for download on the NLRB website at <http://www.nlr.gov/poster>.

QUESTIONS?

For more information about these issues and other employment-related obligations your company may have, feel free to contact us:

Lisa A. Coppola, Esq.

P: 716.854.3400

F: 716.332.0336

C: 716.536.4442

E: coppola@ruppbaase.com

Kimberly A. Georger, Esq.

P: 716.854.3400

F: 716.332.0336

C: 716.510.1994

E: georger@ruppbaase.com

Matthew D. Miller, Esq.

P: 716.854.3400

F: 716.332.0336

C: 716.997.0980

E: miller@ruppbaase.com

This alert was drafted by the attorneys of Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC. Clients and friends are free to copy and to distribute the contents of this alert with proper attribution. The information contained in this alert does not constitute legal advice, and it should not be relied on without consulting a licensed attorney.

BUFFALO
1600 Liberty Building
424 Main Street
Buffalo, NY 14202
Tel: 716.854.3400

ROCHESTER
300 Powers Building
16 West Main Street
Rochester, NY 14614
Tel: 585.381.3400