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Contractor Misclassification Is Back On The Agenda

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Hannesson Murphy
Partner

Most employers that utilize independent contractors know that the classification of workers as "contractors" has been subject to considerable scrutiny over the last few years. At least as far back as 2007, then-*Senator* Barack Obama sponsored the Independent Contractor Proper Classification Act. The Senator's proposed law would have eliminated a 1978 tax code provision that provides a safe harbor to employers that misclassify workers based on commonplace "industry practice." Further, it would have required employers to notify contractors (a) about their tax obligations; (b) that labor and employment law protections do not apply to them; and (c) that the contractor had a right to seek an IRS status determination.

The proposed Act never got out of committee. Nevertheless, this did not stop legislators from later incorporating pieces of the 2007 bill into a multitude of subsequent bills proposed over the years, including the Employee Misclassification Prevention Acts of 2008 and 2010; the Taxpayer Responsibility, Accountability & Consistency Act of 2009; the Fair Playing Field Act of 2010; the Payroll Fraud Prevention Act of 2011; and the Fair Playing Field Act of 2012. None of those bills made it into law either.

Last week, Senator Robert Casey of Pennsylvania introduced S.1687, called the "Payroll Fraud Prevention Act of 2013." Like its predecessors in name and spirit, the purpose of the new bill is to prevent companies from improperly designating workers as contractors. The new proposed law also would impose record-keeping requirements on businesses that use contractors and subject them to government audits on the issue.

If it passes, the new legislation would create another layer of compliance issues for employers. Its central provision would expand the FLSA by creating a new category of workers – "non-employees" – and make it illegal to wrongly classify an "employee" as a "non-employee." Among its many requirements, the proposed law would require employers to provide a written classification notice to all employees advising them of their status. The notice would have to:

1. be sent to *all employees* within 6 months of the bill becoming law (both "non-employee" "contractors" AND all rank-and-file "employees");

2. direct workers to a DOL website if they believe they have been misclassified and provide the address and telephone number of the local DOL office; and

3. include the following boilerplate statement: "*Your rights to wage, hour, and other labor protections depend upon your proper classification as an employee or a non-employee. If you have any*

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questions or concerns about how you have been classified or suspect that you may have been misclassified, contact the U.S. Department of Labor."

The proposed law imposes hefty penalties for an employer's failure to provide the requisite notice ranging from $1,100 in fines (for the first offense) to $5,000 (for the second offense or a willful violation). And, an employer's failure to send the proper notice would result in a presumption that the worker was an "employee." The drafters also included a provision subjecting employers to treble damages under the FLSA for willful violations in misclassifying a worker.

Given the current makeup of Congress, it is unlikely this bill will get much farther than its previous incarnations. Nevertheless, it provides ample evidence that lawmakers remain interested in the classification issue – both from an employee-rights and a tax revenue-generating perspective. Accordingly, employers that use contractors need to be ever-vigilant concerning changes in the law, and must make sure that their practices are consistent with current law. Further, employers also should watch out for regulatory changes designed to implement some of the proposals put forth in the proposed legislation – even if it does not become law.