



Employment LAW BULLETIN

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INDEPENDENT CONTRACTOR CRACKDOWN

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The Internal Revenue Service and certain state agencies are working harder than ever to crack down on employers who misclassify workers as independent contractors. Employers who misclassify workers as independent contractors could suffer severe tax penalties and other legal ramifications.

Merely having a worker sign an independent contractor agreement and treating him or her as an independent contractor for tax purposes does not make that worker an independent contractor. Generally, a worker is not an independent contractor if the company has the right to control and direct the worker as to the details and means by which the project is accomplished. If the contracting company can exercise control only as to the results of the work, the worker is usually an independent contractor. However, it is the right to control that is important, not whether a company actually exerts any control. Other factors suggesting a manager/subordinate relationship are also relevant.

If you answer "yes" to one or more of the following questions, your independent contractor may be misclassified, depending upon all the circumstances.

- Is the worker required to comply with instructions concerning when, where and how the work is to be performed?
- Is the worker given training to do the job?
- Are the worker's services integrated into the company's operations?
- Does the company have employees assist the worker?
- Is the worker hired for an indefinite period of time?
- Does the company require regular oral or written reports from the worker?
- Does the company provide any of the workers' tools or materials?
- Can the worker be terminated "at-will?"

Independent contractors are independent business people who are normally hired to perform specific projects. They are like other vendors (e.g., suppliers) except they are contracted to perform services rather than provide tangible goods. Actions a company can take to help establish a true independent contractor relationship include the following:

- Establish a thorough contract for the independent contractor, specifying that your company is only interested in the results of his or her work and not the means by which the contractor accomplished the work;
- Give no instructions to the contractor other than project specifications regarding the final outcome;
- Give no training to the independent contractor under any circumstances;
- Keep the independent contractor's work separate from that of other employees within your company; if a contractor interfaces significantly with other employees, he or she may take on the appearance of an employee;
- The independent contractor relationship should be of limited duration, preferably on a project basis;
- The independent contractor preferably should be paid by the job, as you are only concerned with the results of the job;
- The independent contractor should have no set hours of work, although you can specify completion deadlines;
- If possible, the independent contractor should be able to specify his or her own place of performance or work;
- A company should not require an independent contractor to give oral or written reports -- this implies that the company has control over the individual; however, in some situations the company may require progress reports to ensure that the person will meet a deadline;
- The contractor should pay his or her own expenses;
- A contractor should give the appearance of being a business, e.g., being incorporated, having a business name and using his or her own business cards;
- An independent contractor should be allowed to work for other companies;
- An independent contractor agreement should contain termination limitations so that your company cannot terminate the independent contractor at-will, as with employees.

If your independent contractor satisfies the basic characteristics above, you can feel more comfortable, but you are not necessarily safe. If you have any questions about whether your contractors are correctly classified as independent contractors, you should have the employment relationship reviewed by legal counsel.

REDUCTIONS-IN-FORCE: BE FOREWARNED

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With the dramatically changing business environment, employers must be careful to comply with numerous state and federal laws when instituting Reductions-In-Force. Most notably, the Worker Adjustment Retraining Notification Act (WARN) must be taken seriously by all employers reducing staff. Any company may be hit with a WARN suit. For example, recently a state attorney general filed suit in federal court under WARN for back pay, lost benefits and interest for laid-off workers of an Internet company. The action alleged that the Internet-related company violated WARN's notice requirements. The attorney general claimed that the employer improperly relied upon an exception to the law for companies actively pursuing financing to avoid

layoffs. The spokesperson said that the claim was “nonsensical” because the employer failed to provide facts to support its defense.

Now is a good time to review WARN obligations. Key provisions of the legislation require certain employers to provide their employees with 60 days’ advance written notice of a plant closing or mass layoff. Companies subject to this Act are those with 100 or more employees, excluding part-time employees, or employers with 100 or more employees who in the aggregate work at least 4,000 hours per week, exclusive of overtime.

Under provisions of the Act, the employer must give 60 days’ notice of a plant closing, either permanent or temporary, where the shutdown results in job loss for 50 or more full-time employees at a single site.

Notice of a mass layoff is required either when 500 or more full-time employees at a site will lose their jobs, or if more than 33% of the work force at a site and a minimum of 50 full-time employees are laid off.

Notice of a plant closing or mass layoff is effective if mailed to each affected employee’s last known address or if included with the employee’s paycheck. Employers should avoid using fine print forms or any preprinted notices in this matter. The notice should be written in a language which is understandable to the employee. As a result, an employer with workers who speak English as a second language or who have little facility with English may want to consider supplying notice in whichever foreign language is appropriate.

Furthermore, the notice should be clear with regard to the anticipated date of the layoff or closing and should indicate if the action is of a permanent or temporary nature. Where employees are unionized, notice is effective if served in writing to union representatives.

Employers are also required to notify certain government officials.

The 60-day notice requirement prior to a plant closing may be reduced to “as much notice as is practicable” if, at the time notice would have been required, the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed giving notice would have precluded the acquisition of the needed capital or business. The notice requirement may also be reduced if the plant closing or mass layoff is caused by business circumstances which are not reasonably foreseeable at the time notice would have been required.

Notice also is not required if the plant closing or mass layoff is due directly to a natural disaster or to a strike or lockout. The notice requirement also does not apply in those situations where the closing is of a temporary facility or is the direct result of the completion of a particular project and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project. Since it is likely that the burden of proving such an understanding may fall on the employer, it is generally best for the employer to clarify temporary work understandings in writing when employees are hired.

If a plant closing or mass layoff results from the relocation or consolidation of part or all of the employer’s business, the employer may avoid the notice requirement if prior to the closing or layoff, the employer offers to transfer the employees and meets certain other requirements of the Act.

An employer who orders a plant closing or mass layoff in violation of the Act is liable to each employee who suffers an employment loss for back pay and benefits for each day of the violation, up to a maximum of 60 days, but in no event for more than one-half the number of days the employee was employed by the employer.

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