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## EMPLOYMENT LAW UPDATE

### **The Department of Labor's Misclassification Initiative: What You Need To Know and Actions You Should Take To Protect Your Company**

On February 1, 2010, President Barack Obama released his federal budget for the coming fiscal year, including \$117 billion for the United States Department of Labor, of which \$25 million was set aside expressly to help the DOL combat employee classification. What does this mean to you? The DOL will be targeting employers who misclassify employees as independent contractors and who classify as exempt from overtime those employees who do not meet the statutory requirements. Not only does the DOL have more money to hire hundreds of investigators to uncover these violations, it has also started the public campaign – “We Can Help.”

The “We Can Help” campaign encourages employees, regardless of their immigration status, to file complaints and provide information regarding his/her employer's pay practices. This campaign is aimed at educating low-wage and vulnerable workers about their rights in the workplace and at helping them connect with services offered by the Department's Wage and Hour Division. Among other industries, this campaign is focusing on reaching workers in industries like construction, janitorial work, hotel/motel services, food services and home health care.

The DOL's misclassification initiative and “We Can Help” campaign were sparked in part by a government study finding that at least 30% of all companies misclassify their workers. The DOL is not the only problem faced by companies who find themselves within this 30%. Rather, this is of great interest to the Treasury Department. This initiative is viewed as a large revenue generator for the IRS, as many misclassified employees have avoided or failed to pay taxes on their 1099 earnings. The employer is an easy target to recover lost revenue for the IRS. Moreover, misclassification and other wage and hour claims are lucrative for plaintiff's lawyers, particularly when they can assert class and collective claims. Such lawyers are more than happy to contact each and every employee of your company offering to represent them in recovering lost wages and benefits due to unpaid overtime, missed break periods, improper rounding on time clocks and any other wage and hour violation that can be raised.

Adding additional complication and support for enforcement of proper classification of employees versus independent contractors, is the new health care legislation. The obligations of employers pursuant to the new health care legislation will in part be driven by the number of employees employed by employers. To that end, this new legislation will lend additional support and publicity for the initiative to correct the misclassification of workers.



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Please note that companies utilizing staffing agencies are not immune. Rather, the DOL will determine whether the employer is the ultimate employer regardless of the contractual relationship with the staffing agency. And, if a violation is found, the Company will be liable despite its use of the staffing agency. Moreover, many staffing agencies' contracts pass through the liability to the contracting employer for any such violation regardless of the DOL's findings.

The consequences of worker misclassification, both as to independent contractors and overtime exempt employees may be severe. Companies are facing ramifications including larger judgments and costs. The expense to employers include back-pay (wages and overtime pay) with interest, unemployment insurance benefits, social security contributions, health, welfare, pension and other benefits, liquidated damages, and legal fees (both your own and the employees), and these expenses can be staggering.

We highly recommend engaging in proactive self audits, in order to seek out and eliminate vulnerability. You should review each and every person that is currently being paid as an independent contractor to determine if that person meets the required test, and review each employment position to determine whether employees should be properly classified as exempt or non-exempt under applicable wage and hour tests. In determining whether an employee is properly classified as exempt or non-exempt, you should pay particular attention to matching duties and functions with each of the approved exemptions. Getting your house in order before the government "knocks on the door" may save time, attorneys' fees and the actual and intangible cost of administrative and civil litigation.

We also encourage that you establish a protocol and implement a strategy for the unannounced knock at the door. In light of the current climate, no such visit should be unexpected.

Determining proper classifications is not an easy process. We encourage you to seek our help and assistance in conducting your audit and preparing a protocol and strategy for the unannounced visit. I am well versed in these matters and I look forward to being a resource for your company.

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*Jodi Johnson is the Chair of the firm's Employment Practice Group focusing on employment counsel, advice and litigation. She counsels and advises private and public sector employers on labor and employment law matters, including hiring and termination decisions, leave and accommodation requests, discrimination complaints and compliance, employment contracts and policies, employee handbooks, wage and hour compliance and leave policies. She also handles employment litigation in the areas of discrimination, wrongful termination, FMLA disputes, ADA disputes, wage and hour disputes, non-compete agreements, harassment, workplace violence and other employment related matters.*



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