

InterConnect FLASH! No. 18 – There Must Be Something in the Water...

The InterConnect FLASH! Practical Bursts of Information Regarding Critical Independent Contractor Relationships

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Coast to coast, both Federal and state governmental agencies are increasingly targeting companies in several industries, including trucking, over employee misclassification, stepping up their audits and enforcements and working together as never before to share information on companies they perceive as misclassifying workers as independent contractors. Plus, newly-enacted state regulations and proposed federal legislation are set to turn the screws ever tighter.

In late September, the U.S. Department of Labor announced that it had signed a memorandum of understanding with the IRS to share information and coordinate law enforcement efforts aimed at stopping misclassification of employees as independent contractors. Eleven states also signed on, including Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Missouri, Montana, New York, Utah, and Washington. Rumor has it that Florida may sign on as well, and other states could follow. Because information about employee misclassification will be shared freely across these federal and state agencies, a company who finds itself in one agency's crosshairs may ultimately end up with the sights of several other agencies pointed squarely at its back.

While California has not yet signed on to the MOU, in late October it enacted a new law which signals that it too is serious about fighting companies over perceived employee misclassification. S.B. 459 penalizes employers who willfully misclassify workers as independent contractors with fines as steep as \$25,000 per violation if the employer is found to make a pattern of such practices. It's not just the employer who is on the hook, though. Any consultant (besides an attorney) who advises the company about independent contractor arrangements is also jointly and severally liable. Interestingly enough, companies who are found to be in violation of the law must also display a website notice for one year detailing their violation. Dubbed the "Job Killer Act" by opponents in California, the new law will take effect in January.

But wait, there's more. In mid-October, a new law was introduced in the U.S. House of Representatives, which is essentially a reintroduction of the Employee Reclassification Prevention Act. H.R. 3178 would impose strict recordkeeping and notice requirements on all employers, requiring written notice to all workers as to whether they have been classified as an "employee" or a "non-employee" and keeping records on hours and wages. Workers would be directed to the Department of Labor's website for a synopsis of their rights. Any business that fails to maintain these records would be subject to fines, even if they are properly classifying their workers. Penalties for recordkeeping, notice, or misclassification violations could be as high as \$5,000 per worker. Of

course, this is not the law of the land, yet. But, it clearly demonstrates from which direction the wind is blowing.

So, what can you do to prepare? Companies should act now to make sure their team is ready to respond if and when an auditor comes calling. Letting an unprepared company clerk handle the first contact with the IRS, Unemployment, or Workers' Comp auditor can be a huge mistake, one which the company may pay for dearly. Having your team all on one page, able to relate a comprehensive story for auditors is key. You and your counsel should also think about federal preemption, as we mentioned in October's Flash on the Port of L.A. lawsuit. And your team may want to consider alternative models, such as the Freight Forwarder Model or Transportation Agent Model we discussed in our April and May Flashes. Finally, make sure that your independent contractor model is up to date and ensure your company's daily interactions mirror properly-drafted contract terms.

The time is ripe to prepare - take a good look at your independent contractor program now, and assemble your team before you are targeted for enforcement. If we at Benesch can be of help in that preparation, please give us a call.

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