

The Bennett Law Firm

Client Update



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Government Clampdown on Independent Contractor Status

As the New York Times reported last week, federal and state governments have begun to aggressively challenge employers' classification of certain workers as independent contractors. The governments' motivation for doing so is to raise revenue. The crackdown is based in part on a recent study that concluded that employers improperly classify as many as 3.4 million regular workers as contractors when in fact they are employees.

A determination by a government agency that an employer has incorrectly classified workers as independent contractors can lead to substantial liability. An employer in this situation can be liable for:

- Unpaid social security and medicare taxes
- Unemployment insurance taxes
- Unpaid workers' compensation insurance premiums
- Unpaid wages, such as overtime pay
- Employee benefit plans liability

Whether a worker is an independent contractor or an employee also determines whether the worker has the right to petition the National Labor Relations Board to be represented by a labor union.

Employer Subject to Multiple Standards

Making matters more complicated, different government agencies apply different legal standards to determine whether a worker is an independent contractor or an employee and thus, someone may be an independent contractor for some purposes but an employee for others. We have litigated these issues with both the State of New Hampshire and the State of Maine, including where one state agency claims employment status while agreeing that another state agency can classify the same people as contractors.

FedEx Cases Highlight Employer Dilemma

FedEx's recent battles with government agencies regarding its thousands of independent contractor drivers highlights some of the issues at stake. In 2008, after a state appeals court ruled that approximately 200 drivers were employees, FedEx agreed to a \$26.8 million settlement. FedEx is currently contesting the Internal Revenue Service's assessment of \$14 million dollars in penalties plus interest as part of an I.R.S. audit related to FedEx's classification of certain drivers as independent contractors.

A number of states are investigating FedEx's use of the independent contractor classification. FedEx is defending dozens of class action suits in state and federal courts challenging FedEx's classification of drivers. On a more positive note, one federal appeals court has ruled that FedEx did not break federal labor laws when it refused to negotiate with a union that wanted to bargain on behalf of workers classified as independent contractors. However, that decision is not binding on courts in other jurisdictions.

Is Your Company At Risk?

If your company utilizes independent contractors, we are available to help assess your company's level of exposure under the various state and federal laws that impact this issue and provide guidance as to what steps you should take now to reduce the exposure.

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