



Colorado Targets Employers That Misclassify Workers

In recent years, both federal and state initiatives have led to increased scrutiny of the categorization of workers as employees or independent contractors and stepped up enforcement efforts. On June 2, Colorado Governor Bill Ritter (D) signed into law H.B. 1310, which imposes significant penalties on employers that misclassify Colorado employees as independent contractors.

Background

Various federal and state laws, enforced by separate agencies, define the term “employee” differently and use their own tests to determine whether a worker is an independent contractor or an employee. As a result, employers are often left to reconcile diverse regulations and tests to make a proper determination as to whether an employer-employee relationship exists.

Recently, a number of states have taken steps to crack down on employee misclassification as they seek, among other things, to replace lost tax revenue. To supplement their individual efforts, states are also working together to address common concerns regarding proper employee classification. Within the last few weeks, for example, the attorneys general for eight states have formed a working group to ensure that a large multi-state employer is properly classifying employees.

Like other states, Colorado has recognized that worker misclassification leads to the underpayment of employment taxes, creates unfair competitive advantages, and denies workers proper protections against economic insecurity. To address those issues, Colorado is now stepping up enforcement against employers that misclassify employees as independent contractors.

New Colorado Law on Independent Contractors

Effective immediately, [H.B. 1310](#) provides significant penalties for misclassifying Colorado workers as independent contractors. For willful violations, employers may be fined up to \$5,000 for each misclassified employee for the first offense and up to \$25,000 for each subsequent misclassification. Upon a second or subsequent willful misclassification, the employer also may be barred from contracting with, or receiving money for performing contracts from, the state for up to two years. Further, misclassification can result in additional liability for employers, including liability for payroll taxes, minimum wage, overtime pay, and benefits.

BUCK COMMENT. *Because the ramifications may be substantial if a number of workers are misclassified, employers should carefully review whether individuals hired or retained as independent contractors are*

properly classified and whether their contractor status is put at risk by treating them as employees. Particular attention should be paid to individuals working on a part-time or limited basis, and individuals who hold themselves out to be independent contractors during the hiring process.

The new law allows employers to request advisory opinions from the Colorado Division of Unemployment and Training. Although any such opinion would be non-binding, the employer's failure to follow it could later be used to establish that a misclassification was willful.

The law directs the Colorado Department of Labor and Employment to conduct and report on a statewide study of employee misclassification within two years. The report must also include results of the Department's complaint investigation and enforcement activities, including the amounts of taxes, interest and fines imposed against employers found to have misclassified employees. As a result, Colorado employers can expect increased scrutiny of their employment arrangements, at least in the near term.

Effective Date. The new law took effect on June 2, 2009.

Conclusion

Worker misclassification exposes employers to penalties and liability for back taxes, pay and benefits, among other things. To minimize this exposure, employers that utilize independent contractors should examine their worker classification practices to ensure compliance with federal and state laws, and review their relationships with independent contractors to confirm that they are properly classified.

Buck's consultants are available to assist in those efforts.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.