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New Jersey targets worker misclassification

On January 20, New Jersey Governor Phil Murphy signed six bills into law aimed at reducing the use of contractors. Among other things, the new laws expand potential liability and impose harsher penalties for misclassifying workers as independent contractors. Employers that use contractors should review and make any needed adjustments in their worker classification protocols to ensure compliance.

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Background

New Jersey law provides employees with certain benefits, such as paid sick leave, unemployment and workers' compensation benefits. It also affords employees — unlike independent contractors — minimum wage and overtime protections. Workers who are improperly classified as independent contractors lack access to benefits and protections they would otherwise enjoy.

Shortly after Governor Phil Murphy took office, he created the Task Force on Employee Misclassification. In July 2019, the task force issued a [report](#) noting a nearly 40% increase in employee misclassification over 10 years and recommending both executive and legislative actions to address a growing problem.

Using independent contractors

On January 20, New Jersey Governor Murphy signed a legislative package targeting the improper use of independent contractors. Six newly enacted laws increase risk, create greater potential liability, and impose harsher penalties for companies in New Jersey that misclassify workers as independent contractors rather than as employees.

The following five laws took effect immediately.

Stop-work orders ([A5838](#))

A5838 authorizes the New Jersey Department of Labor and Workforce Development (NJDOL) to issue a stop-work order based on its initial determination that a worker is misclassified. Seven days' advance notice to the employer is required, allowing the employer an opportunity to appeal the order to the NJDOL or seek injunctive relief from a court. Businesses that receive a stop-work order must cease all operations at the site where the violation exists and face penalties of up to \$5,000 per day for every day they continue to operate in violation of the order. Stop-work orders remain in effect until lifted by the NJDOL or a court of competent jurisdiction.

Additional penalties ([A5839](#))

A5839 increases fines and penalties on companies found to have misclassified workers as independent contractors. It authorizes the NJDOL to assess an "administrative misclassification penalty" of up to \$250 for each misclassified employee for first time violations and up to \$1,000 per employee for subsequent violations. It also includes an employer penalty to be paid to the misclassified worker of "not more than 5 percent of the worker's gross earnings over the past twelve months."

Joint, several and individual liability ([A5840](#))

A5840 imposes joint and several liability for employee misclassification on businesses that contract with a "labor contractor" for violations of New Jersey's wage and hour laws and "employer tax laws" — including the workers' compensation and unemployment compensation laws, Temporary Disability Benefits Law, and the New Jersey Gross Income Tax Act. The law also extends individual liability to owners, directors, officers and managers who violate state wage or tax laws by misclassifying workers on behalf of an employer or staffing agency.

Contracting with public entities ([S4226](#))

S4226 authorizes the NJDOL to name on its website any employer found to misclassify workers or violate any wage, benefit and tax law. It also prohibits them from contracting with any public entity until the violations have been resolved and their names removed from the website.

Tax information sharing ([S4228](#))

S4228 significantly expands information sharing between the New Jersey Division of Taxation and the NJDOL by authorizing the state Division of Taxation to share otherwise confidential and privileged tax information, including tax information statements, audit files, returns, reports, or other information that would assist in investigating violations of state wage, benefit or tax laws.

The sixth law that includes a new posting requirement and anti-retaliation protections will take effect April 1, 2020.

Posting and anti-retaliation ([A5843](#))

A5843 requires employers to post notices about the prohibition against employee misclassification and available remedies in a form soon to be issued by the NJDOL. In addition, it expressly prohibits discharging or discriminating against employees who complain to their employer or to the state, file an action or testify in a proceeding about worker misclassification. Employers will be subject to a fine of up to \$1,000 for violating this law. In addition, employers will be required to reinstate any employee discharged in violation of the anti-retaliation provision and pay the worker for any lost wages and benefits plus punitive damages of up to 200% of the lost wages and benefits, as well as attorneys' fees and costs.

In closing

The new laws significantly increase risk and potential liability for New Jersey businesses that use or rely on independent contractors. Employers should review their current employee classification protocols and assess potential liability risks in light of the NJDOL's increased enforcement authority.

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