

Congress Reconsiders Independent Contractor Classification

11.21.2011

Robert B. Meyer

David L. Woodard

It appears that Congress has again turned its attention to the issue of employee/independent contractor classification. On October 13, 2011, Rep. Lynn Woolsey (D-CA) reintroduced legislation titled the “Employee Misclassification Prevention Act” (EMPA). This bill, if enacted, would amend the Fair Labor Standards Act to impose new obligations on employers which utilize independent contractors, and also penalties for employers which misclassify employees as contractors. Similar legislation was also introduced in the Senate last April, further suggesting that this issue of contractor classification is gaining traction in Congress. The EMPA, as it is presently drafted, proposes the following:

- Require employers to keep records of wages and hours worked by independent contractors. The failure to do so would result in a presumption that the worker is an employee.
- Require employers to provide written notice to every worker of his/her classification as either an employee or contractor. The notice must also direct the worker to a Department of Labor website for information regarding worker rights under the EMPA, and encourage workers to contact the DOL if they have questions about classification.

- Prohibit employers from discriminating or retaliating against workers who exercise their rights under the EMPA.
- Amend the FLSA to make misclassification a prohibited act, and impose double liquidated damages for violations of the minimum wage and overtime pay provisions of the FLSA resulting from the misclassification.
- Impose civil penalties upon employers for violating the EMPA (up to \$1,100 for first violation, and up to \$5,000 for repeat or willful violations).
- Authorize the DOL to conduct targeted audits of employers in “certain industries with frequent incidence of misclassifying employees as non-employees....”
- Permit the DOL to share information with the Internal Revenue Service regarding employers found to have misclassified workers.
- Amend the Social Security Act to establish “administrative penalties for misclassifying employees, or paying unreported wages to employees without proper recordkeeping, for unemployment compensation purposes.”
- Require state unemployment benefits agencies to conduct worker classification audits of employers.

The potential impact of this proposed legislation is far-reaching. It is apparent that the EMPA would create a new federal offense for both intentional and unintentional contractor misclassifications. In addition, the law would create a federal source of new



p.s.

Poyner Spruill^{LLP}
ATTORNEYS AT LAW

employee rights, and would empower the DOL to seek expanded monetary damages on behalf of workers. Therefore, employers should not only remain watchful of this legislation as it works its way through Congress, but also cautious about their use and classification of independent contractors.



p.s.

POYNER SPRUILL publishes this newsletter to provide general information about significant legal developments. Because the facts in each situation may vary, the legal precedents noted herein may not be applicable to individual circumstances. © Poyner Spruill LLP 2010. All Rights Reserved.

RALEIGH

CHARLOTTE

ROCKY MOUNT

SOUTHERN PINES

WWW.POYNERSPRUILL.COM

301 Fayetteville St., Suite 1900, Raleigh, NC 27601 / P.O. Box 1801, Raleigh, NC 27602-1801 P: 919.783.6400 F: 919.783.1075