

# Beware:

## YOUR 'INDEPENDENT CONTRACTOR' MAY ACTUALLY BE AN EMPLOYEE

BY MARIANNE C. TOLOMEO

In a shaky economy, employers often want to hire workers without having to pay for benefits, withholding taxes and overtime pay. As a result, many companies opt to classify some of their workers as “independent contractors,” rather than employees. This approach has come under increased scrutiny, with employers facing harsh penalties for misclassification.



Beginning July 13, businesses will face new penalties for repeated violations of state laws governing the payment of wages, benefits, taxes and other contributions – including workers’ compensation and unemployment compensation laws. This makes it critical for companies to understand who their independent contractors are, as opposed to employees. After a single violation, the employer is subject to a state audit within 12 months. If continued record-keeping, reporting or payment violations are discovered during the audit, business licenses could be suspended or, ultimately, permanently revoked. This is in addition to the \$1,000 fine that can be imposed for each intentional misreporting violation.

The new statute also requires employers to post notices regarding their record-keeping and payment obligations, and prohibits retaliation against employees who report possible violations of any state wage, benefit or tax law.

Here are some guidelines to help differentiate between independent contractors and employees:

- Under the “right to control” test, the worker is considered an employee if the business has the right to direct or supervise his or her work. Even where there is no actual control or supervision (for example, where the expertise of the worker exceeds that of the company), “control” can be found so long as the business reserves the right to dictate work schedule, location and/or the use of particular tools, equipment or subcontractors. If the business simply directs what is done, but not how it is done, the worker is less likely to be considered an employee.
- Under the “relative nature of the work” test, a worker is likely an employee if the company presents the individual’s work product or services as its own, or if the worker performs services that are a central function of the company’s business. Further, when the individual relies on the employer as his or her sole means of support, even if only temporarily, employee status will likely be found. Economic dependence can be established when just 30 percent of the worker’s income was received from the company, or where the individual works there just three days per month. Clearly, the statute is construed liberally, and in borderline cases individuals are classified as “employees.”
- New Jersey’s unemployment statute also helps. It presumes that all individuals performing work or services for compensation are eligible for unemployment benefits. To establish that an individual is not an employee, each of the following three elements must be proven: (A) the individual is free from control or direction over the performance of services; (B) the services are either outside the employer’s usual course of the business or performed outside all its places of business; and (C) the individual is customarily engaged in an independently established trade, occupation, profession or business that will clearly continue if the challenged relationship ends. In other words, if the worker is dependent on the employer and would join the ranks of the unemployed if the relationship was terminated, the worker is considered an “employee.” ❖

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