

Misclassified information

How to avoid the hazards of misclassifying workers

The misclassification of workers as employees or independent contractors is widespread among all types of organizations and it's a practice that's receiving increased scrutiny.

"Although it occurs in all industries, construction in particular is an industry in which misclassifying employees is a common practice and Pennsylvania is cracking down in this area," says Stephen Goldblum, a member at Semanoff Ormsby Greenberg & Torchia, LLC.

Smart Business spoke with Goldblum about the risks of misclassifying workers and how to safeguard against penalties.

Why are employees misclassified?

Using independent contractors rather than employees makes sense for employers that are trying to save money. By doing so, employers avoid the expense of health benefits, unemployment and workers' compensation contributions, insurance premiums and overtime pay, all while reducing administrative costs.

What are the potential dangers?

Problems arise if the government determines that a worker is an employee, and the employer has been treating the worker as an independent contractor. The employer could be responsible for the payment of years of unpaid federal, state and local income tax withholdings, social security and Medicare contributions and unpaid workers' compensation and unemployment insurance premiums. Class action lawyers also have been targeting companies that have incorrectly classified workers.

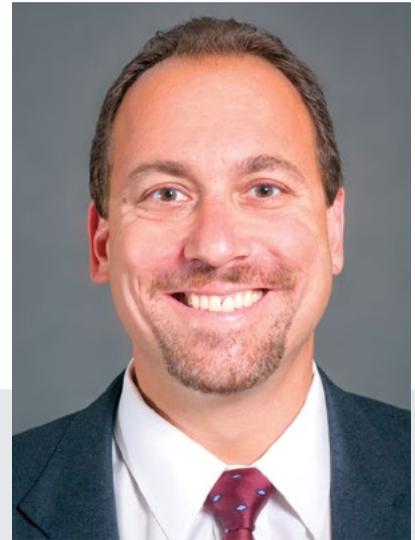
How is the federal government addressing the situation?

The federal government has been cracking down on the misclassification of workers in recent years and the Department of Labor

STEPHEN GOLDBLUM

Member
Semanoff Ormsby Greenberg & Torchia, LLC

(215) 887-5961
sgoldblum@sogtlaw.com



Insights Legal Affairs is brought to you by **Semanoff Ormsby Greenberg & Torchia, LLC**

(DOL) has been hiring more investigators to 'detect and deter' companies from misclassifying employees as independent contractors. The pending Payroll Fraud Prevention Act of 2014 would make misclassification of employees a federal labor offense. The act would expand the Fair Labor Standards Act to cover a new category of workers called 'non-employees' and make it a prohibited act to 'wrongly classify an employee as a non-employee.'

The most significant provision of the act would require every employer to issue a classification notice to each worker stating they've been classified as either an employee or a non-employee. The notice will also direct workers to the DOL for additional information and advise them to inform the department if they suspect they've been misclassified. Violations for failure to comply with the new notice rule include civil penalties in the amount of \$1,100 for a first offense and up to \$5,000 for a second offense or a willful violation. These penalties would be multiplied by the number of employees or non-employees who did not get the required notice or who did not receive it in a timely manner.

How are state governments cracking down?

Each state has its own laws regarding the misclassification of employees. For example, in 2011 Pennsylvania enacted the Construction Workplace Misclassification

Act, which makes it a violation of the law to misclassify employees as independent contractors in the commercial and residential construction industry. Intentional violations of this law are deemed a criminal offense. Violations can also include civil fines of up to \$1,000 for the first violation and \$2,500 for each subsequent violation and can include a court-issued stop work order.

How can companies protect themselves?

It can be difficult for an employer to properly classify a worker as an employee or independent contractor. Many factors go into the determination, and no single factor is dispositive. An important factor in the determination is control — does the employer retain control over how the work is being performed and the manner in which it is being completed? The more the employer exerts control, the more likely the worker will be deemed an employee. Other examples include monitoring, training and exclusivity. Does a supervisor within the company normally direct the individual's work? Does the employer provide training to an individual? Is the individual prohibited from performing similar work for other companies?

It's important to talk to an employment lawyer who can analyze the relevant factors and assist in the proper classification of workers to avoid potentially significant risks and liabilities to the organization. ●