



New Jersey Makes It Riskier for Employers to Classify Workers as Independent Contractors with Passage of Stiffer Penalties

Client Advisories

01.28.2020

New Jersey is taking a sledgehammer to employers who misclassify their workers as independent contractors. It is already difficult for employers to pass the stringent independent contractor test utilized by the state's Department of Labor (DOL) which requires, in part, a showing that the worker at issue has his own independently established trade or business and in essence receives the majority of his income from sources *other than* the company at issue. On January 20, 2020, Governor Murphy signed a series of bills into law unleashing a host of horrors upon companies who cannot make such a showing. For companies who misclassify their workers as independent contractors, they are now subject to the following new consequences:

- **A stop work order issued by the DOL**

This new law, Bill No. A5838, authorizes the DOL to shut down business operations at any location where it finds a violation of any New Jersey wage, tax, or benefit law after an audit or just an initial determination of a violation. If that does not get your attention, we're not sure what will. The DOL must first provide 7 days advance notice of such a stop work order and the company then only has 72 hours to appeal the order. It can appeal to the DOL, which may be a useless exercise considering the DOL is the entity that issued the order in the first place. Alternatively, it can file an appeal in court by seeking an injunction, but that is no walk in the park either given the high standards courts apply for obtaining injunctive relief. The new bill simply provides that the company can "seek" injunctive relief if a stop work order will in fact issue or if the company can show the order was issued in error. But what if there is a technical violation of the law, such as a record keeping violation? A stop work order may be upheld in such a situation. If that were not enough, this bill allows DOL agents to enter the company's business to examine records and speak to employees so long as it is during normal business hours. There is no advance notice requirement noted in this regard. Failure to allow access subjects companies

to a fine up to \$1,000 per day. Failure to comply with the stop work order subjects the company to fines of \$5,000 per day.

- **More Fines**

A second new law, Bill No. A5839, authorizes the DOL to fine a company for having misclassified workers as independent contractors. Fines are \$250 for a first violation and up to \$1,000 for each additional violation. The company may also have to pay up to 5% of the misclassified workers' gross earnings. This is all in addition to the unpaid taxes and contributions the company will already owe and which should have been paid had the company properly classified the worker as an employee.

- **Joint and Several Liability & Individual Liability**

A third new law, Bill No. A5840, makes both employers and the labor contractors from whom they may obtain workers jointly and severally liable for the unpaid wages and taxes due as a result of the misclassification. This bill also specifically imposes individual liability on owners, directors, officers, and even managers for violations when acting on behalf of the employer.

- **"You Broke the Law" Postings**

Another new law, Bill No. S4226, allows the DOL to post on its website the name of any employer found to have violated any state wage, tax, or benefit law, and bars such employers from contracting with any public entity until it corrects the violations.

Related laws also passed include:

- **Sharing of Tax Information**

New law, Bill No. S4228, allows the DOL and the state Department of Treasury to share tax information they have regarding workers for purposes of investigating potential misclassification violations by employers. This will enable the DOL to obtain 1099s that were filed and compare them to the tax returns filed by the purported independent contractor to see if the contractor received most of their income from one source, a main factor the DOL uses for finding employee status.

- **New Posting Requirement by April 1, 2020**

And last, but not least, there is a new notice employers must post by April 1, 2020, presumably to be provided by the DOL, which advises employees that employers cannot misclassify workers as independent contractors; explains the standard for determining employee versus independent contractor status, the benefits to which employees are entitled to, and the remedies they have if they have been misclassified as independent contractors; and provides information regarding how workers may file a complaint if they believe they have been misclassified. The law creating the notice posting requirement also prohibits discrimination against an employee who complains or just inquires about misclassification. Employers who violate this provision are subject to fines, payment of all wages and benefits lost as a result of a discharge or other discriminatory action, and punitive damages equal to two times the lost wages and benefits.



What This All Means for Employers

All of the above means that companies must tread very carefully before classifying a worker as an independent contractor. Especially with the stop work order penalty, companies are now potentially jeopardizing their business if they get it wrong. To get it correct and establish independent contractor status, the DOL requires a showing that (1) the worker at issue is free from control or direction by the company, (2) the service at issue is something that is outside the usual course of the business or is performed outside the place of the business, and (3) the worker is engaged in an independently established trade, occupation, profession, or business. The DOL interprets the last element as in essence meaning that the worker has his own business and obtains his income from many different sources, and not primarily from one company. New Jersey is also seeking to codify a version of this test in another new law which may be even more stringent. Thus, given the hostility to independent contractor classifications and the draconian penalties for misclassification, companies should consult with legal counsel before embarking on this road.

For more information, or if you have any questions regarding this alert, you may contact Archer attorney **Douglas Diaz, Esquire** at ddiaz@archerlaw.com or one of Archer's other experienced **Labor and Employment Law** attorneys at (856) 795-2121.

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