

## **Crackdown on Independent Contractor Misclassification Continues— What Should You Do?**

**By Lori L. Dwyer, Esq. and Andrea K. Johnstone, Esq. | September 27, 2010**

The Maine Worker Misclassification Task Force and the New Hampshire Task Force to Study Employee Misclassification have made the enforcement of worker misclassification laws a top priority. Both task forces have taken their case on the road in an effort to increase awareness of this issue. In New Hampshire, the NH DOL lists it among its top 10 violations. Because of the increased regulatory fervor, employers should revisit this issue and take appropriate steps to ensure compliance or risk substantial fines and penalties.

The temptation to classify workers as independent contractors is great. By classifying workers as independent contractors, employers hope to avoid compliance with a host of federal and state laws and to achieve associated labor cost savings. By way of example, with respect to employees, employers must: complete and retain I-9 forms to confirm immigration status; withhold payroll taxes; pay social security and unemployment taxes; provide workers' compensation insurance; and pay minimum wage and overtime, among other obligations. Anti-discrimination laws generally protect only employees, not independent contractors. If a given worker is not an employee, the company eliminates significant expenses, record-keeping requirements and other compliance obligations. Some estimates put the savings at approximately 20-40% per worker.

But employers should think twice before classifying workers as independent contractors. State and federal agencies, including the ME and NH Departments of Labor and U.S. DOL, have made worker misclassification a focal point of their compliance and audit activities. When these agencies and others perform their audits, the issues they will review extend to general wage and hour compliance, even if misclassification was the matter that prompted them to knock on your company's door. In addition, an audit by one agency can trigger an audit by another or prompt litigation, which can lead to damage assessments from multiple entities, including assessments of back wages, overtime, back taxes, penalties and fines. In cases of willful misclassification, criminal sanctions may be imposed.

Prepare now by:

- Re-familiarizing yourself with the state and federal wage and hour laws and the other worker classification laws applicable to your company;
- Analyzing your company's potential exposure by compiling an employee and contractor census and reviewing classifications for compliance issues, including FLSA exemption qualifications;
- Reviewing and, if needed, updating/entering into independent contractor agreements and/or arrangements, where appropriate;
- Consulting with employment counsel;

- Submitting, where applicable, an application for predetermination of independent contractor status to the Workers' Compensation Board, <http://www.maine.gov/wcb/departments/Coverage/independetcontractor.htm>; and
- Developing and implementing a plan to address misclassified workers to ensure future compliance with applicable employment (and other) laws.

For more information on worker classification issues and other wage and hour matters, contact Lori L. Dwyer, [ldwyer@bernsteinshur.com](mailto:ldwyer@bernsteinshur.com) in our Portland, Maine office, or Andrea Johnstone [ajohnstone@bernsteinshur.com](mailto:ajohnstone@bernsteinshur.com) in our Manchester, New Hampshire office.