

Kimball, Tirey & St. John LLP

Legal Alert

December, 2011

Employer Beware! New Law Increases Statutory Penalties for Improper Classification of Workers AND Requires Notice to the Public for Violations

Before ringing in the new year, businesses with employees in California Law have one more task to complete. Worker Classification Review.

The passage of SB459 adds California Labor Code (“Labor Code”) §226.8. The new law makes Willful Misclassification of an individual as an independent contractor unlawful, and also prohibits an employer from charging fees or making certain deductions from the misclassified employee’s pay. Fines for violations are set as \$5,000 to \$15,000 per violation, in addition to other penalties and fines permitted by law. Further, if a pattern or practice of violations is shown the fines increase to \$10,000 to \$25,000 per violation.

To add insult to injury, the new law requires that violators publicly display notice of the violation for an entire year. The notice must admit to a ‘serious violation’ of the labor code by engaging in willful misclassification of employees, state that the unlawful practices have been corrected and instruct employees that believe they have been misclassified to contact the California Labor and Workforce Development Agency.

SB459 also adds Labor Code §2753, which extends joint and several liability to those who, for money or valuable consideration, knowingly advise employers to classify an employee as an independent contractor.

The effect of this law will primarily be determined on how the term “Willful Misclassification” is interpreted. Labor Code §226.8(h)(4) defines it to mean, avoiding employee status for an individual by voluntarily or knowingly misclassifying that individual as independent contractor. While the standard is intended to be a high bar, interpretations may include violations where the employer has constructive knowledge or ‘should have known’ the misclassification was unlawful.

The law is silent to a private right of action for employees who feel this new law has been violated. While the laws intent appears to leave enforcement in the hands of the Labor Commissioner, employees can and most likely will attempt to pursue civil penalties under California’s Private Attorney General Act (PAGA), which allows them to sue on behalf of the Labor Commissioner.

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While California looks to penalize violations, the federal government (the U.S. Department of Labor and the IRS) has recently issued a memorandum of understanding and in September, the IRS unveiled its Voluntary Classification Settlement Program which allows voluntary self-reporting of misclassifications to limit tax liability in certain situations. However, it has yet to be determined if participation in the voluntary self-reporting program can lead to an admission of violation of the new California laws.

Bottom line, employers need to re-evaluate and confirm that anyone working as an independent contractor for their business, is undoubtedly properly classified as such.

If you have any questions regarding improper classification, please contact Karl Schlecht, Esq. or Katherine Henggeler, Esq. in our Business Real Estate Group at (800) 564-6611.

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