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Please contact one of the authors or any of the attorneys in our Labor and Employment Practice Group if you have any questions regarding this alert.

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New California Law Penalizes Willful Misclassification of Independent Contractors

Effective January 1, 2012, a new California law creates large penalties for employers who "willfully" misclassify their workers as independent contractors. The new law comes amid a growing crackdown by the federal government and various states on employers who treat regular employees as independent contractors, thereby avoiding taxes and side-stepping various employment laws.

Overview

The bill, SB 459 (Corbett), was signed into law by Governor Jerry Brown on October 9, 2011, and adds Sections 226.8 and 2753 to the California Labor Code. The new law does not change the test for determining whether a worker qualifies as an independent contractor, but it greatly increases the financial risk for employers who misclassify workers. Under Section 226.8, it is unlawful for any person or employer to engage in the "willful misclassification" of an individual as an independent contractor. "Willful misclassification" is defined as "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor." Labor Code § 226.8(i)(4). In addition to the act of misclassification, each time a misclassified worker is charged a fee or has his/her pay reduced as a result of the misclassification, there is a new violation of Section 226.8.

How Employers Will Be Affected

Penalties range from $5,000 to $15,000 per violation for isolated violations. Where there is a pattern or practice of violations, the penalty range increases—$10,000 to $25,000 per violation. Under new Section 2753, paid advisors (excluding attorneys and employees of the company) who "knowingly advise" employers to misclassify workers are jointly and severally liable for any penalties imposed on the employer as a result of the misclassification.

In addition to the new costly monetary penalties, employers who violate the new law are required to post a "prominent" notice on their public website stating, among other things, that they have "committed a serious violation of the law" by willfully misclassifying employees, and directing any other employees who feel they have been misclassified to contact the Labor and Workforce Development Agency.

How Employers Can Minimize Risk

As with other California labor statutes, this one identifies the Labor Commissioner as the enforcement agency, but permits employees to enforce their rights through the courts. Employers must therefore be mindful of the risk of classifying groups of workers as independent contractors, especially given the prevalence of wage/hour class actions in California. At a minimum, employers who regularly use independent contractors should consider obtaining arbitration agreements with class action waivers to minimize their exposure in this area.

Independent contractor classification is a nuanced legal question, and the new penalties underscore the importance of receiving sound advice in this area. Additionally, in light of the new advisor liability provision, consultants and accountants who might otherwise offer their advice on how to classify workers should put this question to an employment attorney.

For a general overview of the rules for determining whether a worker is an employee or an independent contractor, click **here**.

If you require additional information or for any questions regarding this new law, you are invited to contact the authors or their colleagues in **Venable's Labor and Employment Practice Group**.
