

UPDATE: SCRUTINY CONTINUES ON WORKER CLASSIFICATION

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Last summer we published a [“client alert”](#) detailing the increased scrutiny on the correct classification of workers occurring at both a state and federal level. Since that time, the focus on “busting” businesses that allegedly misclassify workers as independent contractors has continued with aggressive efforts at both the state and federal levels, as well as a new court of appeals ruling on the standards to be applied for making the classification.

CONTINUING ENFORCEMENT ACTIVITY

- The state master business license application has added a specific question asking whether new businesses intend to hire independent contractors. Any business that checks this box receives a letter from the Department of Labor & Industries (“L&I”) on correct classification. Many such businesses will be contacted by L&I to assess whether they are making their classification correctly.
- [L&I](#), in conjunction with the [Employment Security Department](#) (“ESD”) have created a report fraud program specifically aimed at seeking out “employer fraud.”
- L&I and ESD are both conducting targeted enforcement audits. According to an [ESD press release](#), industries of particular focus are freight trucking, schools, **contractors**, **construction**, salons, rental services, janitorial, **real estate**, recreational facilities and couriers. Based on our experience, ESD and L&I seem to be sharing information.
- [Several recent articles](#) have reported on the increased volume of I-9 audits by Immigration & Customs Enforcement (I.C.E.). We have also seen firsthand that the I.C.E. is leveling substantial fines for technical violations in I-9 recordkeeping.

NEW COURT RULINGS

In December the Washington Court of Appeals published an opinion that changes the emphasis in classifying workers as employees or independent contractors. In *Anifson v. FedEx Ground Package System, Inc.*, the court adopted the “economic realities” test used under the federal Fair Labor Standards Act instead of the common law “right of control” test for determining whether workers should be classified as employees for state wage and hour claims.

The economic realities test has six factors:

1. the permanence of the working relationship between the parties;
2. the degree of skill the work entails;

3. the extent of the worker's investment in equipment or materials;
4. the worker's opportunity for profit or loss;
5. the degree of the alleged employer's control over the worker;
6. whether the service rendered by the worker is an integral part of the alleged employer's business

This test uses many of the same factors as the common law right of control test, but significantly drops the subjective factor of what type of relationship the worker and employer believed they were creating. The critical issue under this test is whether as a matter of economic reality, the worker is dependent on the business to which he or she renders service.

WHAT SHOULD EMPLOYERS DO?

The increased emphasis on worker classification makes it important that employers use sound practices in deciding whether a worker will be treated as an employee or independent contractor. To help with the classification, we have updated and streamlined our classification checklist to focus on the six factors of the economic realities test. We also continue to believe that, if you choose to classify workers as independent contractors, taking the following three steps - emphasized in our June 2010 alert - is still critical:

1. **Signed contracts.** A contract is the first thing the agencies assessing the status of a worker will look for. The contract should clearly define the relationship as that of an independent contractor.
2. **Collect W-9s and Issue 1099s.** This is an important recordkeeping requirement.
3. **Verify Washington State Uniform Business Identifier (UBI) numbers.** An active business license for is one of the primary things auditors consider in making their determination. We also recommend that you verify that the NAICS code on the license corresponds to the type of business for which you are hiring the contractor. Finally, make sure the contractor maintains that license in good standing. The Department of Revenue has a web site that you can look up business license information ([click here](#)) and you can also check through the Department of Licensing's website ([click here](#)).

CONCLUSION

There is no question that aggressive audit activity and the related assessments will continue (especially in light of current budget deficits). If you have any concerns about how you are classifying workers, the time to address those questions is before you get the audit notice.

If you have questions about how to work with independent contractors, employees or in responding to an notice audit or subpoena relating to workers, please contact Rodger Kohn at 206-682-5600 or rkohn@tousley.com.