

## LAW &amp; GOVERNMENT

## Independent or not?

## New York, Feds scrutinize use of contractors

By JOSEPH KELLARD

Business owners who use independent contractors beware, particularly if you live in New York.

The message that state politicians and bureaucrats have broadcast for years got ratcheted up recently after the U.S. Department of Labor's Wage and Hour Division in July issued an updated guidance for employers to use to determine whether to classify their workers as independent contractors or employees.

Attorneys expect a heightened crackdown on misclassification in New York, with its Department of Labor joining forces with the U.S. Department of Labor. New York even created a separate task force to root out misclassifying businesses.

The federal guidance suggests an expanded interpretation of what constitutes an independent contractor and an employee. Essentially, the new guidelines mean many of the former are now the latter and therefore entitled to benefits and legal protections under the Fair Labor Standards Act. That makes workers eligible for minimum wage, overtime compensation, and health and unemployment insurance. All of those don't apply to independent contractors.

The guidance indicates that many employers misclassify to skirt FLSA requirements and that few workers qualify as contractors. It highlights the "economic realities test" that uses six factors to determine if a worker is economically dependent on the business and emphasizes whether the contractor's work is integral to the business. The test helps determine the extent to which employers control the work the contractors perform and the means by which they accomplish their tasks.

Brian Shenker, a senior associate at Alan B. Pearl & Associates in Syosset, said that in recent years the New York DOL has tightened the definition of independent contractor, with fewer workers classified as such, and that with the U.S. DOL's emphasis on the economic realities test, the state will likely follow the guidance.

"I would certainly predict that, based on the U.S. DOL guidance, that the New York DOL will further tighten its definition and further crackdown on misclassification of independent contractors," Shenker said.

Employees who knowingly or unknowingly misclassify workers may have to fork up unpaid taxes and face penalties that could include back pay for overtime, as well as financial fines and prison time.

Backing up its guidance, the U.S. DOL made a budget request that includes an additional \$32 million and 300 full-time staff employees to investigate and enforce classification laws nationwide.

The state DOL in 2013 entered into a memorandum of agreement with the U.S. DOL, one of 26 states that collaborate with the federal department to crack down on misclassification. The U.S. DOL has also joined forces with the Internal Revenue Service to share leads, referrals and documents toward this same end.

"They've got direct communication, the funding in the budget, and they've put together a team that is both federal and state," Schlissel said. "That to me speaks volumes that there is going to be this increased scrutiny, investigations and audits by the Department of Labor, and increased class actions."

Uber, the app-based car-sharing service, and Federal Express have both been subject to class action lawsuits in California that claim the companies misclassify drivers as independent contractors.

In addition to transportation, independent contractors work in many industries, from healthcare and beauty care to information technology and construction; their ranks include dancers at strip clubs and professional sports cheerleaders, that latter of which have filed misclassification-related lawsuits against teams in New York.

The issue of misclassification has been brewing in the state for several years. In 2007, then-Gov. Eliot Spitzer assembled the Joint Enforcement Task Force on Employee Misclassification.

"It is as intense now as it ever has been and that new [U.S. Wage and Hour Division] administrator's opinion letter certainly would reflect that," said John Ho, a labor attorney at Garden City-based Bond, Schoeneck & King.



Photo by Bob Gigliore

Attorney Brian Shenker believes more laws redefining independent contractors are possible in New York.

According to JETTF's 2014 annual report, the task force found nearly \$316 million in unreported wages and assessed nearly \$8.8 million in unemployment insurance contributions. That year, the state DOL completed more than 1,800 fraud investigations that uncovered more than \$264 million in unreported wages and nearly \$7.2 million due in unemployment insurance contributions.

"This is certainly one way they can fill their coffers by attacking this classification to get a lot of this money back in contributions and taxes and things of that sort," Ho said.

In New York, where proposals are on the table to increase the minimum wage and reclassify blue-collar workers to qualify for overtime pay under FLSA, some predict that more misclassification-related laws could come about.

In recent years, New York has issued new misclassification laws targeted at specific industries, such as construction and transportation, which established a presumption of employment status.

Enacted in 2010, the Construction Industry Fair Play Act presumes individuals working for an employer are employees unless they meet certain criteria as part of a 12-factor test. At the time, the state determined that as many as 25 percent of construction workers may be misclassified. Because workers in the industry typically don't work 9-to-5 hours and 52 weeks a year, the industry was ripe for the state's scrutiny, Schlissel said.

"There's a temptation to treat them or call them independent contractors, so it was in response to that that this legislation was passed," she added.

Moreover, studies the state DOL cited that found misclassification rates are disproportionately high in the trucking industry led to the Commercial Goods Transportation Industry Fair Play Act. Enacted in April 2014, the law presumes drivers of commercial vehicles are employees unless payments for their services are reported on a 1099 tax form.

"The New York government is going about it piecemeal, by identifying industries where there are problems and passing these laws like they did in the construction and commercial transportation industries," Ho said.

Until new laws are enacted, though, whether for targeted industries or more broadly, attorneys expect greater enforcement based on various tests. Shenker doesn't think a crackdown on misclassification necessarily entails a change in the law. "It just requires them to tighten further their interpretation, which they have done over the last several years," he said.

Schlissel said that even when courts say they use the economic realities test, some nevertheless apply a different list of factors.

"My take on it is that we're going to have different interpretations from different courts," she said, "and the amount of deference that the guidance has given is going to vary from jurisdiction to jurisdiction."

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