



News & Trending

PUBLICATIONS & ALERTS

N.C. INDUSTRIAL COMMISSION AND U.S. DEPARTMENT OF LABOR TEAM UP TO ADDRESS WORKER MISCLASSIFICATION

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By Travis Hockaday

On August 31, 2016, the North Carolina Industrial Commission, Employee Classification Section (the “Section”) and the Wage and Hour Division of the United States Department of Labor (the “WHD”) entered into a **Memorandum of Understanding** (MOU) under which the agencies will work together to coordinate investigations into possible instances of worker misclassification in North Carolina and to provide outreach and education programs to employers in an effort to reduce misclassification. Generally, misclassification is the practice of classifying workers who should be considered employees as independent contractors.

As North Carolina employers will recall, Governor Pat McCrory established the Section on December 18, 2015 through **Executive Order 83**. The Section’s mission is to: (i) create a program to receive and manage complaints of alleged worker misclassification; and (ii) coordinate efforts among various state agencies (including the N.C. Department of Revenue, the N.C. Industrial Commission, the N.C. Department of Commerce Division of Employment Security and the N.C. Department of Labor) to independently investigate complaints of misclassification received by the Section and/or those agencies and take enforcement action against businesses in violation of those agencies’ statutes and rules, if warranted.

Under the new MOU with the WHD, the WHD will, in its discretion, share with the Section information obtained in the course of its investigations of North Carolina employers that may indicate an employer’s potential violations of applicable employment tax, unemployment insurance, workers’ compensation and wage and hour laws. In turn, the Section will share such information with the other state agencies listed above for investigation and enforcement action. Similarly, the Section may provide WHD with information it believes may constitute evidence of a violation of any federal law that the WHD enforces, including the Fair Labor Standards Act, the Migrant and Seasonal Agricultural Worker Protection Act, prevailing wage requirements under the Davis-Bacon and Related Acts and the Service Contract Act, and the Family and Medical Leave Act.

The WHD currently is working under similar agreements with the Internal Revenue Service and more than 30 other states to address misclassification and its effects on workers’ wages, benefits and employment-related protections, as well as on tax revenues for federal and state governments, including unemployment and workers’ compensation funds. The Section and the WHD will be working together to establish a methodology for exchanging investigative leads, complaints and referrals of possible violations and will form a team of representatives from each agency to meet on a regular basis to discuss issues of common concern and to review actions being taken under the MOU.

In addition to their enforcement priorities, the Section and the WHD will participate in joint outreach and education efforts and share training materials and opportunities. The Section and the WHD anticipate that their collaborative efforts will result in increased compliance by employers with state employment and unemployment tax requirements and wage and hour laws and a reduction in worker misclassification and questionable employment, unemployment and workers' compensation practices.

As we **reported** last year, the WHD issued guidance addressing independent contractor classification under the federal Fair Labor Standards Act (FLSA) in which it highlighted its expansive interpretation of the standard for employee classification and concluded that "most workers are employees under the FLSA." Given the WHD's position on classification issues, North Carolina's recent establishment of the Section, and the new joint initiative between the Section and the WHD, employers would be wise to take action now to assess their relationships with individuals classified as independent contractors and re-evaluate any questionable classifications.

Employers should remember that a complaint made to, or an issue arising in, only one state agency relating to a worker who is potentially misclassified as an independent contractor may well mushroom into independent investigations by any number of the various state and federal agencies referenced above. The focus of those investigations could extend far beyond the complainant's individual situation, reach into the employer's across-the-board classification, wage and hour, and tax practices, and involve an examination of the classifications of many workers.

Employers also should understand that regulatory scrutiny is not industry-specific. While local press coverage over the last few years has focused primarily on misclassification in the construction industry and the WHD has reported a coordinated focus on construction, agriculture, hospitality, janitorial services, food service, residential care and others, no industry is immune. Questions about worker classification can arise in any business. It is not uncommon for start-ups and businesses in emerging industries to engage independent contractors to cover core business functions. These arrangements are increasingly susceptible to close scrutiny by regulators.

If you have questions about worker classification issues, please contact the Smith Anderson lawyer with whom you normally work.

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