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Labor Department beats the misclassification drum



5/15/2013

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By Carlyn Kolker

NEW YORK (Reuters) - The Department of Labor is working with state agencies, zeroing in on certain industries and weighing in on private lawsuits, in an effort to end misclassification of workers, a top department lawyer said on Tuesday.

"Just because an individual is labeled an independent contractor does not mean they are," said Katherine Bissell, a deputy solicitor at the Department of Labor.

Bissell was speaking at a conference in New York sponsored by the American Bar Association's section on labor and employment.

Workers who are classified as independent contractors typically do not receive benefits such as healthcare and are generally not subject to workplace protections such as the Family and Medical Leave Act and the Americans with Disabilities Act. Employers in turn typically do not pay into worker's compensation or unemployment insurance on behalf of those workers.

At the heart of the issue is what level of control workers assert over their hours and work product.

"Our goal is not to get rid of independent contractors," Bissell said at the conference, which took place at the offices of New York law firm Proskauer Rose. "If it's an appropriate classification we have no qualms with that."

Bissell said the Department of Labor currently has agreements with 14 states to work cooperatively to enforce state and federal laws on worker misclassification.

The department has focused on enforcement efforts in the construction industry and among janitorial workers and restaurant workers, she said. The department is looking into new industries, she said, but did not elaborate.

In addition, the Department of Labor has continued to make its voice heard on private misclassification litigation by filing amicus briefs. One goal is to convince courts to take an expansive view of the scope of an employment relationship, Bissell said.

She pointed to an amicus brief in a case called *Scantland v. Knight* that is pending before the 11th U.S. Circuit Court of Appeals involving cable installers who say they were misclassified as independent contractors.

Lawyers who represent plaintiffs and defense lawyers also noted their challenges litigating in the area.

Rachel Bien, an attorney at Outten & Golden who represents workers in misclassification cases, said that plaintiffs have limited remedies, as the Fair Labor Standards Act does not, for example, allow employees to recoup the money they spent on out-of-pocket expenses such as healthcare.

Steven Hurd of Proskauer Rose, who represents employers, said he cautions companies to be conservative when classifying workers.

"These are cases that are typically very difficult to win for the employer," said Hurd.

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5/15/2013 3:49:45 PM by [RichardReibstein](#)

This is an excellent overview of the issue of independent contractor (IC) misclassification. The US Department of Labor (DOL) is not just focusing attention on the three industries mentioned by the DOL speaker; rather, according to its own press releases, Congressional testimony, and other publicly available materials, it is targeting many other industries, including nursing, health care services, restaurants, courier services, transportation, landscaping,

warehousing, food processing, and professional and personnel service industries. While many of the cases brought by the DOL and class action lawyers against companies for misclassifying employees as ICs are, as noted by one of the lawyers quoted in the article, "difficult to win for the employer," companies can and do "win" these types of cases. The best way to "win" an IC misclassification case is to structure, document, and implement the IC relationships in a manner that complies with federal and state IC laws. There are diagnostic tools available to ascertain the extent of the company's current level of IC compliance and what steps can be taken to enhance such compliance. By use of such tools, businesses can enhance their state of IC compliance to avoid misclassification liability, as noted in a white paper on the subject found in the "Resource" page of www.IndependentContractorCompliance.com. Richard Reibstein (reibsteinr@pepperlaw.com)

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