



VIEW*S* & VISIONS

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To Employ or Contract – the Risks of Misclassification

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His litigation experience includes defending employers against various claims of wrongful discharge, discrimination based on age, sex and weight, hostile work environment, sexual harassment, retaliation and other alleged violations of state and federal law. Mr. Harrison works with employers regarding a wide range of issues, including wage and hour disputes, collective bargaining issues and drug and alcohol testing.

He earned his law degree from the West Virginia University College of Law in 2002, where he was Chief Justice of the Moot Court Board, vice-president of the Student Bar Association and a public interest advocate fellow for the NAACP.

He received a bachelor of arts degree and a master of arts degree, both in political science, from West Virginia University.

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Many companies rely upon independent contractors, and this reliance has increased dramatically in recent years in a variety of industries, especially the technology sector. Regionally, many companies have increased reliance upon independent contractor arrangements in the energy sector, and we can expect that trend to continue with continued economic development of the Marcellus Shale. There are several advantages to using independent contractors, including workforce and staffing flexibility. Additionally, companies that properly use independent contractors are not required to withhold taxes, make Social Security and Medicare contributions, or pay workers' and unemployment compensation premiums. These economic benefits often prompt many employers to inadvertently classify workers as independent contractors even though these workers should be classified as employees. Liability for misclassification is significant, complex and often subject to varying rules and procedures by several state and federal agencies.

At the federal level, misclassification issues are handled by the U.S. Department of Labor (DOL) and the Internal Revenue Service (IRS). The DOL has recently initiated its "Misclassification Initiative" under the auspices of Vice President Joe Biden's Middle Class Task Force, which has included memorandums of understanding with many states across the country. These arrangements involve coordinated enforcement efforts and information sharing about non-compliant employers. The IRS also scrutinizes misclassification issues in order to recover lost revenue by companies that fail to make proper withholdings for employees who are improperly misclassified as independent contractors.

Other regulatory agencies also focus on independent contractor misclassification, including state agencies responsible for administering unemployment and workers' compensation claims. For example, it is common for "contractors" to file for



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unemployment compensation, despite the fact that these individuals have signed independent contractor agreements or otherwise freely entered into independent contractor arrangements. Determinations during the claims process may result in significant fines and penalties if employers have not paid unemployment and workers' compensation premiums for these individuals.

Reliance upon independent contractor arrangements may help the bottom line, but without careful review and evaluation of independent contractor relationships, doing so may provide a short-term gain at a long-term price.

In addition to federal and state regulatory compliance issues, employers who rely upon independent contractors often invoke scrutiny in terms of wage and hour issues. Employers who improperly classify workers as independent contractors may risk liability exposure under the Fair Labor Standards Act (FLSA) for failing to comply with minimum wage and overtime requirements. Failure to comply with the FLSA may result in an investigation from the Wage & Hour Division of the DOL, in addition to lawsuits and class actions from misclassified employees.

Companies certainly are not prohibited from relying upon independent

contractors and, in many situations, it is perfectly legal to do so; however, to avoid potential liability for misclassification, employers should carefully consider whether their independent contractor arrangements satisfy some of the basic legal tests to determine where these arrangements are lawful. Contract language will not control the outcome of these arrangements. An agreement that repeatedly declares that the worker is an independent contractor will not afford any protection to the company if the factors used by the government demonstrate otherwise. Indeed, companies that rely upon standardized, written contractor agreements often tend to overlook the need to review and update their labor force models to ensure that their independent contractor arrangements are lawful.

Companies should continue to expect additional scrutiny regarding misclassification issues. Reliance upon independent contractor arrangements may help the bottom line, but without careful review and evaluation of independent contractor relationships, doing so may provide a short-term gain at a long-term price. ▽