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ARTICLES & INSIGHTS

ABOUT THE AUTHOR



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North Carolina Doubles Down on Enforcing Employee Misclassification

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On August 11, 2017, Governor Roy Cooper signed into law the Employee Fair Classification Act. While the Act does not change the definition of what constitutes an “employee” under existing North Carolina law, the Act does establish a new division of the North Carolina Industrial Commission called the “Employee Classification Section” which will serve as a clearinghouse for the reporting and investigation of employee misclassification complaints. Its mission, as stated on the NC Industrial Commission’s website, is “to identify businesses that engage in activities of Employee Misclassification throughout the State of North Carolina and collaborate with State agencies to conduct independent investigations in order to determine if there has been a violation of the respective agency operating statutes.”

This legislation follows media coverage of complaints that some businesses were undercutting their competition by invalidly classifying as independent contractors workers who should be considered employees. While it is a common misconception that such workers may choose this status, state and federal laws dictate the classification of workers, who are legally presumed to be employees unless the company successfully passes strict tests relating to control over the means and methods by which the work is performed.

Upon receipt of such complaints, the Employee Classification Section is tasked with sharing these complaints with other state agencies that may have an interest in the matter. These state agencies include the Department of Labor, Division of Employment Security, the Industrial Commission’s Compliance and Fraud Investigative Division, and Department of Revenue, as well as federal agencies such as the Wage and Hour Division of the United States Department of Labor. The sharing of such complaints significantly increases the level of exposure employers can face as a result of even a single report of employee misclassification. In addition, employers requiring state licensure will be required to disclose employee misclassification investigations on their application documents, which could impact their ability to conduct business in North Carolina. This new law requires occupational licensing boards and commissions to deny licenses, permits, and applications to any applicant who fails to comply with this disclosure requirement.

Under the Act, which becomes effective on December 31, 2017, workers will receive information regarding the distinction between an employee and an independent contractor. All North Carolina employers (defined as an individual or entity that employs one or more employees) will be required to display a poster informing employees of their rights under the new law, including how and where employees may report any misclassification claims.

This poster must include a notice indicating the following:

- That any worker who is defined as an employee under state law shall be treated as an employee unless he/she is demonstrated to be an independent contractor;
- That any employee who believes that he/she has been misclassified as an independent contractor may report the suspected misclassification to the Employee Classification Section; and
- That the physical location, mailing address, telephone number, mailing address and e-mail address of premises on which alleged incidents of misclassification occurred may be reported to the Employee Classification Section.

It is highly likely that this poster requirement and the notifications contained therein will lead to an increase in the number of allegations of worker misclassification. The Act requires that the Employee Classification Section publish an annual report that details the number of employee classification reports received, the number and amount of back taxes, wages, benefits, and penalties or other monies collected, and the number of cases referred to other agencies.

Before the December 31 deadline, North Carolina employers should carefully audit the status of any worker classified as independent contractors to ensure proper classification

If you have questions regarding this legislation or other legal issues, please feel free to contact Connie Carrigan at ccarrigan@smithdebnamlaw.com.

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