

ALERT

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November 15, 2011

Senate Bill 459 Imposes Penalties for “Willful” Misclassification of Employees as Independent Contractors

On October 9, 2011, California Governor Jerry Brown signed Senate Bill 459 (“Bill”) into law. The Bill imposes significant penalties against employers if they are found to have been involved in “willful” misclassification of employees as independent contractors. The Bill is effective January 1, 2012.

New Civil Penalties

Employers face a civil penalty of between \$5,000 and \$15,000 each time they are found to be in violation. Additionally, if an employer is found to have engaged “in a pattern” of violations, the penalty is increased to \$10,000 to \$25,000 per violation.

Also, the Bill provides that non-lawyers who advise an employer to misclassify a worker as an independent contractor to avoid employee status for the worker are jointly and severally liable with the employer.

Violations

The Bill has made it unlawful for any person or employer to engage in:

- (1) “willful” misclassification of an individual as an independent contractor; and
- (2) To charge a misclassified individual any fee or make any deduction from such individual’s compensation for ordinary expenses such as rent and services where such charges would have been unlawful had the individual been properly classified as an employee.

The “Scarlet Letter” Rule

The Bill requires employers who are found to have violated the new law to post a notice “prominently” displayed on the employer’s website notifying employees and the general public of the violation. The notice must be displayed for a period of one year. In case of employers without a website, the notice must be displayed “prominently” in an area that is “accessible to all employees and the general public.”

The notice must be signed by an officer, and must contain the following:

- (1) The employer has been found to have committed a serious violation of the law by engaging in the willful misclassification of employees.
- (2) The employer has “changed its business practices to avoid committing further violations.”
- (3) Any employee who believes he or she is being misclassified may contact the state Labor and Workforce Development Agency.
- (4) The notice is being posted “pursuant to a state order.”

The Bottom Line for Employers

This Bill raises significant monetary risk for employers who may be misclassifying employees as independent contractors. The Bill provides scant guidance on the meaning of “willful” misclassification. It defines “willful” misclassification as misclassification that is “voluntary and knowing.” This vagueness in definition is particularly troublesome considering the draconian consequences attached to any violation. We believe that it is important for all employers in California to review their roster of independent contractors to determine if potential misclassification exists.

If you have any questions about how this may apply to your company or any other questions, please contact your Green Hasson Janks advisor at (310) 873-1600.

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