What you Need to Know About State & Federal Wage and Hour Laws Volume 1, Issue 1

# Wage & Hour Compliance Monitor

## Employers Get Misclassification Relief

To address the growing problem of employee misclassification, the Internal Revenue Service (IRS) has developed a new program to permit taxpayers to voluntarily reclassify workers as employees for federal employment tax purposes. The Voluntary Classification Settlement Program (VCSP) is similar to the current Classification Settlement Program (CSP), but is optional and provides taxpayers with an opportunity to voluntarily reclassify their workers as employees for future tax periods with limited federal employment tax liability for the past nonemployee treatment. To participate in the program, the taxpayer must meet certain eligibility requirements, apply to participate in VCSP, and enter into a closing agreement with the IRS.

Employee misclassification is a growing problem. In 2010, the Wage and Hour Division collected nearly $4 million in back wages for minimum wage and overtime violations under the Fair Labor Standards Act that resulted from employees being misclassified as independent contractors or otherwise not treated as employees.

The misclassification of employees as something other than employees, such as independent contractors, presents a serious problem for affected employees, employers, and to the entire economy. Misclassified employees are often denied access to critical benefits and protections – such as family and medical leave, overtime, minimum wage and unemployment insurance – to which they are entitled. Employee misclassification also generates substantial losses to the Treasury and the Social Security and Medicare funds, as well as to state unemployment insurance and workers compensation funds.

In September 2011, the Department of Labor, announced a major step forward with the signing of a Memorandum of Understanding (MOU) between the Department and the Internal Revenue Service (IRS). Under this agreement, the agencies will work together and share information to reduce the incidence of misclassification of employees, to help reduce the tax gap, and to improve compliance with federal labor laws.

Whether a worker is performing services as an employee or as an independent contractor depends upon the facts and circumstances and is generally determined under the common law test of whether the service recipient has the right to direct and control the worker as to how to perform the services. In some factual situations, the determination of the proper worker classification status

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# DOL Proposes to Update Child Labor Regulations

The U.S. Department of Labor is proposing revisions to child labor regulations that will strengthen the safety requirements for young workers employed in agriculture and nonagricultural fields. The proposal will also incorporate into the regulations the enforcement policies the division follows when determining whether to assess a civil money penalty for child labor violations. The agricultural hazardous occupations orders under the Fair Labor Standards Act that bar young workers from certain tasks have not been updated since they were promulgated in 1970.

The department is proposing updates based on the enforcement experiences of its Wage and Hour Division, recommendations made by the National Institute for Occupational Safety and Health, and a commitment to bring parity between the rules for young workers employed in agricultural jobs and the more stringent rules that apply to those employed in nonagricultural workplaces. The proposed regulations would not apply to children working on farms owned by their parents.

"Children employed in agriculture are some of the most vulnerable workers in America," said Secretary of Labor Hilda L. Solis. "Ensuring their welfare is a priority of the department, and this proposal is another element of our comprehensive approach."

> Commitment to bring parity between the rules for young workers employed in agricultural jobs and the more stringent rules that apply to those employed in nonagricultural workplaces.

## *Child Labor Provisions for Employment in Nonagriculture*

The department is proposing to create two new nonagricultural hazardous occupations order that would prevent children under 18 from being employed in the storing, marketing and transporting of farm product raw materials. Prohibited places of employment would include country grain elevators, grain bins, silos, feed lots, stockyards, livestock exchanges and livestock auctions. The other hazardous occupation would address the use of electronic devices, including communication devices, while operating or assisting to operate certain power-driven equipment, including motor vehicles.

## *Child Labor Provisions for Employment in Agriculture*

The proposal would strengthen current child labor regulations prohibiting agricultural work with animals and in pesticide handling, timber operations, manure pits and storage bins. It would prohibit farmworkers under age 16 from participating in the cultivation, harvesting and curing of tobacco. And it would prohibit youth in both agricultural and nonagricultural employment from using electronic, including communication, devices while operating power-driven equipment.

Additionally, the proposal would prohibit farmworkers under 16 from operating almost all power-driven equipment. A similar prohibition has existed as part of the nonagricultural child labor provisions for more than 50 years. A limited exemption would permit some student learners to operate certain farm implements and tractors, when equipped with proper rollover protection structures and seat belts, under specified conditions.

The Department's proposals apply only to young hired farm workers and in no way change the statutory parental exemptions applicable to children of any age who are employed on a farm owned or operated by their parent.

## *The Assessment of Child Labor Civil Money Penalties (29 CFR Part 579)*

Finally, the Department is proposing to revise its civil money penalty regulations to incorporate into the regulations the processes the Department follows when determining both whether to assess a child labor civil money penalty and the amount of that penalty. The Department believes this proposal will increase the public's understanding of the child labor civil money penalty assessment process while preserving national consistency in its administration.

The Department encourages, and in fact relies on employers to voluntarily comply with the FLSA, including the child labor rules. However, the FLSA does provide several enforcement tools. DOL uses these tools, when necessary, to compel compliance with the FLSA and its child labor regulations.

The FLSA gives DOL the authority to investigate possible violations of its rules, including the power to examine an employer's records and to interview employees to determine if the employer is in compliance with the Act. When violations are found, an investigator will explain the violations to the employer and seek agreement for future compliance. But DOL also may take any of the following actions:

- Assess civil money penalties.
- Seek an injunction in the Federal Courts.
- Initiate criminal action in the Federal Courts.
- Take a "hot goods" (legal action that prevents the shipment of products that were created where child labor was involved) action in the Federal Courts.

The proposed regulations are evidence of the fact that the Department takes the protection of youth in the workplace very seriously and continues to focus efforts on this sector of the workforce. Employers are encouraged to familiarize themselves with child labor laws and keep apprised of any changes to the regulations.

# State Notification and Posting Changes for 2012

Eight states will be raising their minimum wages commencing Jan. 1, 2012. All of the eight except Washington mandate that the new minimum wage posters be displayed commencing with the New Year. The eight and their details are:

**ARIZONA:** The Industrial Commission announced a 30-percent minimum wage increase from $7.35 an hour to $7.65. Tipped employees can be paid up to $3 less per hour providing their tips bring them over the minimum rate.

**COLORADO:** The Department of Labor and Employment announced a 28-cent increase in the minimum wage, bringing it from $7.36 an hour to $7.64. Similarly, the tipped minimum wage will rise from $4.34 to $4.62.

**FLORIDA:** The Department of Economic Opportunity announced a 36-cent increase on top of a 6-cent increase on June 1, 2011. The New Year's rate thus rises to $7.67 an hour from $7.31.

**MONTANA:** The Department of Labor and Industry is raising the minimum wage 30 cents an hour, bringing it from $7.35 to $7.65.

**OHIO:** The Department of Commerce revealed a 30-cent increase to raise the minimum wage from $7.40 to $7.70 an hour on New Year's Day. However, the minimum wage for tipped employees is decreasing 15 cents to $3.70 an hour from $3.85. Additionally, employers can pay the federal minimum wage of $7.25 an hour to minors 14- and 15-years-old and to adults if the business grosses $283,000 or less in a year.

**OREGON:** According to the Bureau of Labor and Industries, the state minimum wage will take a 30-cent jump from $8.50 an hour to $8.80.

**VERMONT:** The Department of Labor has pegged the new hourly minimum wage at $8.46 an hour, up from $8.15.

**WASHINGTON:** The state will sport the highest minimum wage for a state in the nation at $9.04 an hour, up from $8.67 an hour. (Again, the posting is not mandatory, however.)

**OTHER STATE CHANGES:**

**ARIZONA:** The Industrial Commission of Arizona has updated the state's "Work Exposure to Methicillin-Resistant Staphylococcus Aureus (MRSA), Spinal Meningitis, or Tuberculosis (TB)" notice. According to the agency, certain classes of employees may more easily establish a claim related to MRSA, spinal meningitis or TB by reporting the details of the exposure to the employer no later than 30 calendar days after the possible significant exposure.

Also, a claim involving the diagnosis of MRSA must be made within 15 days after the employee reports the incident. Per the agency, this change is mandatory and all employers must replace their old notices dated 6/09 with the current version dated 7/11.

**CONNECTICUT:** The Connecticut Commission on Human Rights and Opportunities has updated the state's "Discrimination is Illegal" notice. According to the agency, "gender identity or expression" has now been added to the list of protected classes under Employment, Housing and Public Accommodations, and Credit Transactions.

Other changes include the term "intellectual disability" added to list of protected classes under Employment. Per the agency, this change is mandatory and all employers are required to replace their old posters dated 06/24/11 with the current version dated 10/1/11.

**KANSAS:** The state of Kansas has updated two of its labor law notices, the Workers' Compensation poster and the Unemployment Insurance poster.

The Kansas Department of Labor is now requiring employers to display the Workers' Compensation poster in both Spanish and English, and the newly released version contains both languages. This posting is mandatory, and all employers in the state must update their poster dated 3/08 with the new one dated 5/11.

The Kansas Unemployment Insurance notice has been updated with new hours available to apply in person, along with information on making one's claim on the Web.

**MISSOURI:** The Missouri Commission on Human Rights has updated three notices: Discrimination in Employment, Discrimination in Public Accommodations, and Discrimination in Housing.

- Discrimination in Employment: According to the agency, the Missouri Human Rights Act makes it illegal to discriminate in any aspect of employment including hiring and firing, recruitment, compensation and fringe benefits. The notice now lists and details discriminatory employment practices under the Act.
- Discrimination in Public Accommodations: The updated notice now defines the term "places of public accommodation" in detail. Other changes include the types of discrimination prohibited by the Missouri Human Rights Act in places of public accommodation.
- Discrimination in Housing: The notice now expands the "familial status" protected class to include children under the age of 18 living with parents or legal custodians, pregnant women, and people securing custody of children under the age of 18.

**OKLAHOMA:** The state of Oklahoma has updated its "Workers' Compensation Notice and Instruction to Employers and Employees" notice. Effective immediately, employers must inform their employees that a claim for compensation for any accidental injury or death must be filed with the Workers' Compensation Court within two years from the date of the accidental injury or death.

Any person receiving temporary disability benefits from an employer or the employer's insurance carrier shall, within seven days, report in writing to the employer or insurance carrier any change in material fact or the amount of income the employee is receiving.

This change is mandatory and all employers must update their outdated notice dated 07/05 with the current version dated 08/11.

**SOUTH CAROLINA:** The South Carolina Department of Labor, Licensing and Regulation has updated its "Labor Law Abstract" notice. Effective Jan. 1, 2012, all South Carolina employers are required to enroll in the E-Verify program. The amended law requires all employers to verify the legal status of all new employees through E-Verify within three business days of hiring.

The penalties for failure to enroll in and use E-Verify to verify new hire employment eligibility will result in probation for the employer or suspension/revocation of the employer's business license.

**Relief** Continued from page 1.

under the common law may not be clear. For taxpayers under IRS examination, the current CSP is available to resolve federal employment tax issues related to worker misclassification, if certain criteria are met. The examination CSP permits the prospective reclassification of workers as employees, with reduced federal employment tax liabilities for past nonemployee treatment. The CSP allows business and tax examiners to resolve the worker classification issues as early in the administrative process as possible, thereby reducing taxpayer burden and providing efficiencies for both the taxpayer and the government. In order to facilitate voluntary resolution of worker classification issues and achieve the resulting benefits of increased tax compliance and certainty for taxpayers, workers and the government, the IRS has determined that it would be beneficial to provide taxpayers with a program that allows for voluntary reclassification of workers as employees outside of the examination context and without the need to go through normal administrative correction procedures applicable to employment taxes.

The program applies to taxpayers who are currently treating their workers (or a class or group of workers) as independent contractors or other nonemployees and want to prospectively treat the workers as employees. To be eligible, a taxpayer must have consistently treated the workers as nonemployees, and must have filed all required Forms 1099 for the workers for the previous three years. The taxpayer cannot currently be under audit by the IRS.

Furthermore, the taxpayer cannot be currently under audit concerning the classification of the workers by the Department of Labor or by a state government agency. A taxpayer who was previously audited by the IRS or the Department of Labor concerning the classification of the workers will only be eligible if the taxpayer has complied with the results of that audit. Taxpayers may apply for the VCSP using Form 8952, Application for Voluntary Classification Settlement Program.

# Employers May Need to Consider Compensation for use of PDAs, Tablets, and Cell Phones

These days, smart phones, tablets and PDA's are a so prevalent that many employees utilize them as a tool for checking email, responding to requests and researching work related items. The potential issue for employers becomes what legal issues they need to consider when an employee uses technology for work purposes outside of work hours even when that technology is not issued by the employer. While the Fair Labor Standards Act (FLSA) delineates employer requirements addressing wage and hour issues, there is currently no precedent for what constitutes overtime when dealing with electronic communication.

The FLSA requires that covered, nonexempt employees in the United States be paid at least the federal minimum wage for each hour worked and receive overtime pay at one and one-half times the employee's regular rate of pay for all hours worked over 40 in a workweek. Therefore employees need to be paid for time spent reading or responding to work related email even when it is done electronically and outside of work hours.

However, where the employee utilizes electronic technology only occasionally and the time spent doing so is truly de minimus (insubstantial or insignificant amounts of time beyond a worker's scheduled hours if it cannot "as a practical matter" precisely record the small portions of time involved), then the time spent might not be an issue. Consequently, failure to adequately compensate employees for such activity can prove to be a costly proposition. Unfortunately, the concept of de minimus is dangerously vague and ill-defined under the FLSA and there are many things to consider in its parameters such as aggregate time spent on activities and the regularity of these activities.

There are some steps that employers can take to protect themselves until time spent working on electronic devices is better defined under the FLSA:

1. Require non-exempt employees to keep accurate records of all time spent working on mobile devices and count this time as hours worked when computing wages.
2. Limit remote e-mail access to exempt employees.
3. Adopt policies and making sure that they are followed. The policies should provide clear expectation of how employees should manage their time (ie limit the amount of the time they can spend on electronic work-related communication or require work in consecutive blocks of time instead of sporadic intervals) and what types of activities can be reported as hours worked.
4. Employers who know a certain amount of time every day will be spent checking email outside of work can adopt a policy providing a fixed amount of paid time outside of work for such tasks in addition to the work time recorded for each day.

While litigation regarding this issue is relatively new, employers need to be aware that it is becoming a growing area of concern. Until more specific direction is given by the Department of Labor, employers should make sure that they are paying employees for all hours worked and that they have sound policies in place so that procedures are consistent and well understood.

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