

Blog Post

Cracking Down on Employers Misclassifying Employees as Independent Contractors

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New Jersey has joined California and New York City by adding significant new penalties and requirements on employers doing business in the Garden State, including new penalties for misclassifying workers as independent contractors and new posting requirements effective April 1, 2020. Illinois, New York, Oregon, Washington, Wisconsin, and Florida considered various forms of legislation on worker misclassification in 2019, and other states may soon join the parade.

Employers in New Jersey now face penalties and other requirements set forth in six new statutes for the misclassification of workers as independent contractors. All but one of the laws already took effect this year. The new one requires employers to post a warning against the misclassification of employees and is effective on April 1, 2020.

New Jersey uses the “ABC Test” in determining whether a worker is an independent contractor. Under that test, a worker should be considered an employee *unless all* the following circumstances apply:

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A. The individual has been and will continue to be free from control or direction over the performance of work performed, both under contract of service and in fact; *and*

B. The work is either outside the usual course of the business for which such service is performed, or the work is performed outside of all the places of business of the enterprise for which such service is performed; *and*

C. The individual is customarily engaged in an independently established trade, occupation, profession, or business.

Misclassification Penalties

The New Jersey Department of Labor Wage and Hour Division (the “Department”) is authorized to assess penalties on an employer for misclassifying an employee of up to \$250 per misclassified employee for a first violation, and up to \$1,000 per misclassified employee for each subsequent violation. The Department also may require an employer to pay the misclassified worker a penalty of not more than five percent of the worker’s gross earnings over the past 12 months.

The Department may rely on the following factors to determine the amount of a miscalculation penalty:

1. Prior violations by the employer;
2. The seriousness of the violation(s);
3. The employer’s good faith; and
4. The size of the employer.

To assess these penalties, the Commissioner must provide notice of the violation, the amount of the penalty, and an opportunity to request a hearing. An employer will have 15 days to request a hearing to

challenge the assessment of any administrative penalty.

Posting Requirements

Beginning April 1, 2020, New Jersey businesses must post a notice on misclassification conspicuously at their place of business “in a form to be issued by the commissioner.” The Department is required to create and maintain a webpage containing the following:

1. The prohibition against employers misclassifying employees;
2. The elements of the ABC Test;
3. The benefits and protections to which an employee is entitled under New Jersey wage, benefit, and tax laws;
4. The remedies under New Jersey law to which workers affected by misclassification may be entitled; and
5. Information on how a worker or the worker’s authorized representative may contact, by telephone, mail, and email, the Department to provide information or file a complaint regarding misclassification.

Penalties for violating the posting requirement, or retaliating against any individual who inquires or complains to the employer or the Department about misclassification (or cooperates in any such proceeding), includes fines ranging from \$100 to \$1,000 per violation. If an employee is misclassified as an independent contractor, the employer must correct any retaliatory action and pay all wages and benefits lost as a result of the retaliatory act or reinstate the misclassified employee with back pay. Punitive damages are also available to an aggrieved employee equal to two times the lost wages and benefits, plus attorneys’ fees incurred.

Stop Work Orders

Stop work orders are now part of the state's tools to address employee misclassification. If the state determines an employer violated state wage, benefit, or tax law, it may issue a stop work order. The state must provide seven days' notice of intent to issue a stop work order.

The Department also has the power to enter a place of business to determine compliance with state wage, benefit, and tax laws, and to determine if a stop work order is warranted. It also has the authority to issue subpoenas for documents and witness testimony. If an employer delays or hinders an investigation, the Department is authorized to assess penalties and fines of at least \$1,000 per day.

Tax Information

The New Jersey Treasury Department is now authorized to share confidential tax files with the Department, including tax information statements, audit files, reports, returns, or reports from investigators.

Personal Information of Violators

After providing fifteen days advance written notice, the Department may post on its website the name(s) of any person found to violate any state wage, benefit, or tax law based on a final order issued by the commissioner. Persons on this list are prohibited from contracting with any public body until the employer resolves the violation to the satisfaction of the Commissioner.

Joint Liability

Labor contractors and their client employers can now be found jointly liable for violations of wage and hour, employer tax, disability benefits, unemployment compensation, and workers compensation laws. The new law also includes

individuals acting on behalf of an employer, which can be “an owner, director, officer, or manager” of the employer.

For guidance on state or local laws regarding proper classification of workers, contact your Akerman attorney.

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