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Misclassifying workers

CATHY CHENEY | PORTLAND BUSINESS JOURNAL

Portland lawyer Steve Larson says classification of long-haul drivers often presents tough decisions for carriers.

The means of identifying a worker as employee or contractor are often **confusing** for employers.

Identifying independent contractors poses risks

BY MELODY FINNEMORE
SPECIAL TO THE BUSINESS JOURNAL

As employers search for ways to cut costs, many are turning to independent contractors as a way to boost manpower while saving money in benefits, taxes and other expenses associated with full-time employees.

The strategy could backfire, however, if an employer misclassifies someone as an independent contractor when the worker actually is considered an employee under state and federal laws. And the means of identifying a worker as one or the other is often confusing for many employers.

Amanda Gamblin, an associate and employment law attorney with Portland's Schwabe Williamson & Wyatt PC, said industries most likely to be affected by the employee misclassification issue include those with a high reliance on independent contractors and temporary workers, such as construction, high tech and the arts. As employers in these sectors hire people to fill peak or seasonal needs, they don't exactly have a one-size-fits-all formula for classifying them, Gamblin said.

"They're an independent contractor for tax purposes under one test, and for the employer's human resources department there's a second test. If they apply for worker's comp it's a third test, and if we're talking about the Bureau of Labor and Industries' Civil Rights Division, there's yet a fourth test," she said. "Needless to say, this is maddening for employers trying to figure out whether someone is an independent contractor. The common theme is how much the employer controls that person, or what we call 'the right to control test.'"

The test focuses on how much an employer determines a worker's schedule.

"If they come to work at 8, take lunch at noon and you're deciding when they can take vacation, they are an employee," Gamblin said.

On the other hand, if a worker provides their own tools or supplies, pays for their own insurance and has their own office, they most likely can be considered an independent contractor, she said, adding the length of the work relationship can be an indicator as well.

"If someone has been an independent contractor for three years and they've never worked for anyone else, that might raise some questions," Gamblin said. "None of these factors are determining, but they are all weighted."

MISCLASSIFY: Confusion remains despite Legislature's clarification

The 2005 Oregon Legislature attempted to clear up some of the confusion with a revised independent contractor law that took effect Jan. 1, 2006. That law considers service providers to be independent contractors if, among other things, they are "free from direction and control" of an employer; bear the risk of loss for their work; provide contracted services for two or more different people within a 12-month period; and have the authority to hire and fire their own employees while providing services, according to the state's Web site.

However, establishing a business entity such as a corporation or limited liability company doesn't in itself establish that the person providing services can be considered an independent contractor, according to the state.

"The No. 1 thing for employers to understand is that it's always safe to classify someone as an employee, and there's always a risk in classifying someone as an independent contractor," Gamblin said.

Also, when working with independent contractors, it's crucial to spell out the agreement in writing.

"If they are an independent contractor, have all of the terms laid out in a contract and then follow them," she said.

Steve Larson, an attorney with Portland's Stoll Stoll Berne Lokting & Shlachter PC, has seen firsthand how the issue is a growing problem for many employers. Larson is one of several attorneys representing Federal Express drivers in Oregon in a class action suit against the company seeking back pay, operating expenses and benefits.

The suit, which involves about 17,000 FedEx drivers nationwide and in Canada, alleges the company unfairly classified the drivers as independent contractors, yet required the drivers to follow company rules and otherwise exercised excessive control over their work.

On Aug. 13, the California Court of Appeals upheld a ruling that affirmed the company's independent contract drivers should be classified as employees.

Larson said companies that hire drivers, including long-haul truckers, need to be particularly careful.

"Different companies want the fleet to look the same, they want everyone to wear uniforms that look the same and they want to control the hours they work, but they don't want to classify them as employees," he said.

The issue is generating action not only legally, but politically as well. New York Gov. Elliot Spitzer last month established a state task force to address the problem. The task force will report to the governor each February possible legislative or regulatory solutions to misclassification of employees, which Spitzer called "a growing epidemic that is keeping wages and benefits artificially low for working New Yorkers."

Just a few days after Spitzer's announcement, U.S. Sens. Barack Obama, Richard Durbin, Ted Kennedy and Patty Murray introduced the Independent Contractor Proper Classification Act of 2007, a bill intended to protect workers and taxpayers against employee misclassification.

A recent study conducted by the School of Industrial Labor Relations at Cornell University estimates that approximately 10 percent of workers reviewed from audits conducted by the Department of Labor were misclassified. In the construction industry, the number rose to 15 percent.

Given the significant financial incentives companies have to misclassify employees, Larson says the problem may grow worse before it gets better.