Federal Bar Association
Labor and Employment Law Section
Spring 2013

The Labouring Oar

From the Chair

The year is going by fast and our board has been hard at work. We are pleased that our second newsletter is going out, and we are making the final plans for the 5th Bi-Annual Labor & Employment Law Conference in New Orleans, La., on May 2-3, 2013 at the Westin New Orleans. Our conference has been co-sponsored this year by the Corporate and Association Counsel Division with tremendous support from the New Orleans Chapter. For those of you that have not reviewed our agenda, I encourage you to visit our website and review the outstanding line up of speakers, which includes several members of the judiciary. We hope to see you in the "Big Easy."

In addition to the New Orleans conference, our board has been busy working on other programming. We should be shortly announcing several planned webinars—including one that will provide valuable insight with a panel of administrative law judges, including representatives from the National Labor Relations Board and Equal Employment Opportunity Commission. One of our board members, Craig Cowart, will be speaking on April 11, 2013 at the North Alabama Chapter's Labor & Employment Law Symposium in Huntsville, Ala. We are also putting a proposal together to again present a CLE session at the FBA Annual Meeting and Convention in San Juan, Puerto Rico. Hopefully the proposal will be accepted, and we will offer another CLE opportunity during the September 2013 convention.

I strongly encourage all section members to attend the Annual Meeting and Convention in San Juan, Puerto Rico. During the convention, the section will hold a board meeting that will be open to all section members. We have also created an award committee, which will recognize outstanding contributions to our section. We have had numerous contributions to our newsletters, articles for use in *The Federal Lawyer*, and reports for our circuit update and email blasts. Please continue to contribute to these publications and keep in mind, we present our section's first awards in San Juan. As always, if anyone would like information about our section and upcoming events, or if you would like to serve or have any ideas on how we can better improve the section, please do not hesitate to contact me. ■

Danielle Brewer
Chair

A Look at What's Inside

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The Patient Protection and Affordable Care Act: Current Concerns Regarding Employer-Provided Health Care Coverage

By Tara Craft Adams

President Obama signed the Patient Protection and Affordable Care Act (ACA) on Mar. 23, 2010, seeking to extend health care insurance to more than 30 million people. In June 2012, the Supreme Court largely upheld the law. However, less than one year before many of the ACA's provisions are scheduled to be implemented, many unanswered questions remain, particularly where employer-provided health care coverage is concerned.

Employer "Pay or Play" Mandates

Beginning in January 2014, large employers may be penalized if the employer fails to offer full-time employees and their dependents minimum essential coverage or offers coverage that is considered to be unaffordable under the terms of the ACA. Failing to offer coverage will trigger a penalty in the amount of $2,000 per year per each full-time employee, excluding the first thirty full-time employees.[1]

A "large employer" is defined by the ACA as one which employs at least 50 full-time equivalent employees during the preceding calendar year.[2] A full-time employee is an individual averaging at least 30 hours of service per week, calculated on a monthly basis (excluding full-time seasonal employees working less than 120 days during the calendar year).[3] Although an employer is not required to offer coverage to part-time employees, or pay penalties for not offering coverage to part-time employees, hours worked by part-time employees are included in the calculation of a "large employer."[4]

The coverage offered by employers must also be considered "affordable." Employer coverage is considered unaffordable if: (1) the employee's share of the premium for self-coverage is more than 9.5 percent of the employee's modified adjusted gross household income and, (2) an employee receives a subsidy for coverage through a state exchange.[5] If the coverage offered is not affordable, employers are subject to up to a $3,000 per year penalty for each employee that receives a federal individual insurance subsidy.[6]

Issues with Family Coverage

Employers must offer affordable coverage to their employees beginning in 2014, and must offer coverage to dependents starting in 2015. The ACA's definition of dependent does not include an employee's spouse, but covers children of an employee who are under the age of 26. Coverage for an employee is affordable if the employee's contribution for self-only coverage does not exceed 9.5 percent of the employee's household income. Therefore, although an employer is required to offer coverage to an employee's dependents, the meaning of affordable is interpreted solely using the cost of individual coverage for the employee. There is no guarantee that an employer is obligated to offer affordable health coverage for that employee's family. Family coverage is typically much more expensive, and employees typically pay much larger premiums for family coverage than for individual coverage. This has garnered much debate, because some working-class families may not be able to afford family coverage offered by their employer, and yet still may not qualify for state exchange subsidies. Individuals who do not carry health insurance are subjected to a penalty under the ACA. In 2014, that penalty is the greater of 1 percent of income or $95 multiplied by the number of uncovered individuals in a family, not to exceed 300 percent of $95. There has not been a final decision regarding affordability of family coverage, although it has been proposed that uninsured spouses and children of employees would not be subject to a tax penalty for not having insurance if the cost of the employer's health coverage for the entire family exceeded 8 percent of household income.[7]

Religious Objections to the ACA

Currently, no other provision in the ACA has garnered more litigation than the requirement that health care coverage include contraception. Recently, there has been a flood of lawsuits in federal courts challenging the provision in the ACA requiring employers to cover contraception in health plans offered to employees as violative of the Religious Freedom Restoration Act. The ACA provides that employers must cover "all contraceptive methods and sterilization procedures" approved by the FDA.[8] The ACA does offer an exemption for religious employers who meet a four-part test: (1) their purpose is to inculcate religious values; (2) they primarily employ people who share their religious beliefs; (3) they primarily serve people who share their religious beliefs; and (4) they are nonprofit groups with tax-exempt status.[9] However, many religious institutions do not meet these requirements because they employ and serve members of different faiths, and their purpose is not solely to inculcate religious values, such as in the case of many religiously-affiliated hospitals, universities and social service agencies. Consequently, numerous religious institutions have filed lawsuits seeking relief from the law. Additionally, private employers have also challenged the provision, arguing that the government is forcing them to violate their religious beliefs.

A number of federal courts have addressed the issue and reached varying results. In most cases, courts have found the cases unripe, deferring judgment until the federal government issues expected exemptions for religiously-affiliated institutions.[10] However, other courts have granted injunctive relief from the provision .[11] The split in court decisions makes the matter highly likely to end up before the U.S. Supreme Court at some point. However, because the regulations regarding faith-affiliated organizations have yet to be finalized, any decision would likely be premature.

In response to the controversy, new proposed rules were issued on Jan. 30, 2013, under which insurers would provide women with free birth control coverage through a separate plan if an employer objected to paying for contraception. Under the new proposal, churches, nonprofit religious organizations and other institutions that object to providing birth control on religious grounds would not have to pay for it. Rather, the costs of the birth control would instead be paid by the insurance company, who would then get a credit against the fees insurance companies will pay for selling health insurance in the state and federal exchanges.

Many questions about the ACA's implementation remain unanswered. Regulations interpreting the act will continue to issue from the Department of Labor, Department of Health and Human Services, Internal Revenue Service, and the Treasury Department. ■

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Endnotes

[1]Patient Protection and Affordable Care Act, Pub. L. No. 111-48, § 1513, 124 Stat. 119 (2010) (amending I.R.C. § 4980H(a)).

[2] *Id*. at § 2719, 1513 (amending I.R.C. § 4980(H)(d)(2)).

[3]*Id*. at § 1513 (amending I.R.C. § 4980(H)(d)(4)(A)).

[4]*Id*. at § 1513 (amending I.R.C. § 4980(H)(d)(2)(C)).

[5]*Id*. at § 114(amending I.R.C. § 6056)

[6]*Id*. at § 1513 (amending I.R.C. § 4980H(a)).

[7]78 Fed.Reg. 7355 (Feb. 1, 2013).

[8]77 Fed.Reg. 8725 (Feb. 15, 2012)

[9]*Id*.

[10]See e.g. *Belmont Abbey College v. Sebelius*, 878 F. Supp. 2d 25 (D.D.C. 2012); *Zubik v. Sebelius*, 2012 WL 5932977 (W.D. Pa. Nov. 27, 2012); *Catholic Diocese of Nashville v. Sebelius*, 2012 WL 5879796 (M.D. Tenn. Nov. 21, 2012); *Wheaton College v. Sebelius*, 2012 WL 3637162 (D.D.C. 2012).

[11]See e.g. *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012); *Tyndale House Publishers v. Sebelius*, 2012 WL 5817323 (D.D.C. Nov. 16, 2012); *Roman Catholic Archdiocese of New York v. Sebelius*, 2012 WL 6042864 (E.D.N.Y. Dec. 4, 2012).

Notice Issues in Collective Actions Involving Joint Employer Claims

By Erin E. Pelleteri and Camalla M. Kimbrough

Background of FLSA

The Fair Labor Standards Act (FLSA) was enacted in 1938 and, in the simplest of terms, establishes a uniform minimum hourly wage,[1] a standard forty-hour work week with premium pay for additional "overtime" hours worked,[2] and mandates that an employer maintain certain records for all employees for a three year period in accordance with the regulations prescribed by the Administrator of the Wage and Hour Division of the U.S. Department of Labor.[3]

Any employee aggrieved under the FLSA may file an individual action to enforce his rights, or aggregate his claims with hundreds or thousands of other claimants in what is known as a collective action.[4] And, in addition to wages, a successful FLSA litigant may recover both liquidated damages and attorneys' fees.[5]

While the protections of the FLSA extend only to employees,[6] the definition of an "employee" under the FLSA encompasses more than just direct employees. The FLSA applies to "any person acting directly or indirectly in the interest of an employee in relation to an employer."[7] Accordingly, any entity benefitting from the employee's work is a potential employer under the FLSA. This type of issue typically arises in subcontracting and employee leasing situations. But, the doctrine is not without boundaries.

Courts consider several factors in determining whether an entity is—as a matter of "economic reality"—the employer of the worker: (1) who provided the equipment the employee used; (2) whether the employee was economically beholden to the putative employer; (3) the level of skill employed by the workers; (4) whether the putative employer has an ownership interest in the subcontractor; (5) the degree to which the employee's efforts are supervised by the putative employer; (6) whether the employee worked predominantly for the putative employer; (7) who set the terms and conditions of the employment; and (8) who maintained the employment records regarding the employee.[8]

After an examination of these factors, if the court determines that the defendant is the employer and there has been an FLSA violation, it can award full recovery of all unpaid wages and penalties.[9] Thus, while an employer may take every precaution to ensure its own compliance with the FLSA for its direct employees, it may still find itself defending an action brought by individuals with whom it has worked, but never paid directly.

The Emergence of Collective Actions

Though written into law more than 70 years ago, collective action suits are largely a product of the last ten years. The number of FLSA collective action suits filed in federal courts more than tripled between 2000 and 2009,[10] a trend that commentators have attributed to the strained economy, increased enforcement by government agencies, and a rise in lawyers specializing in cases with multiple claimants. Whatever the reason, the filings continue to increase, forcing employers to make defending these cases a priority. But, defending FLSA claims in court is neither a straightforward nor easy task.

Employers face an uphill battle when it comes to the real fight in FLSA collective action suits: conditional certification. With rare exceptions, courts have adopted a lenient approach to conditional certification that ignores merit-based defenses by defendants and permits plaintiffs to issue notice and engage in class-based discovery based on allegations or untested plaintiff affidavits alone. And, the grant of conditional certification is interlocutory. So, there is virtually no clear guidance from the circuits on the appropriateness of the predominant two-step process.[11]

Following conditional certification, the historic dearth of collective actions makes many of the procedural issues presented in collective actions ones for which there is little, to no, precedent. Accordingly, it is incumbent on the parties to anticipate some of these issues and plot a clear course moving forward to avoid stalling the litigation.

Before turning to one of these issues—the one that forms the basis of this article—a brief explanation of the prevailing procedure that courts utilize when determining whether to certify a collective action is illustrative.

The Two-Step Certification Process

Section 16(b) of the FLSA provides that a person may maintain an action on "behalf of himself ... and other employees similarly situated." In determining whether plaintiffs are "similarly situated" for purposes of certifying a collective action, the majority of courts use the two-step test set forth in *Lusardi v. Xerox Corp.,* 118 F.R.D. 351 (D.N.J. 1987). The first step of the analysis is the "notice stage" in which the court determines—usually based only on the pleadings and any affidavits which have been submitted—whether notice of the action should be given to potential class members. Because courts generally have minimal evidence, this determination is made using a fairly lenient standard, and typically results in conditional certification of a representative class.

The second step of the analysis typically occurs when discovery is largely complete and the defendant moves to "decertify" the conditionally-certified class. At this point, the court makes a factual determination as to whether there are similarly-situated employees. If the court finds that the claimants are similarly situated, the collective action may proceed. However, if the claimants are not similarly situated, the court will decertify the class, dismiss the opt-in plaintiffs without prejudice, and allow the original plaintiffs to proceed on their individual claims.

It should be noted that, where substantial discovery has taken place prior to a certification motion, some courts have required the plaintiffs to satisfy the more onerous standard that is generally applied at the later or second stage of litigation.[12] This higher standard is akin to that applied when considering whether to certify a class action under Rule 23 because the court has sufficient information before it to make a factual determination on the similarly-situated question, by analyzing the following factors: (1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to [the defendant] which appear to be individual to each plaintiff; and (3) fairness and procedural considerations.

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5th Bi-Annual

Federal Bar Association

Labor and Employment Law Conference

Westin New Orleans Canal Place

New Orleans, LA

A limited number of rooms at the Westin New Orleans Canal Place have been set aside for conference participants: single double rate $209, triple rate $239, and quad rate $259, for the nights of May 2-3, 2013. Additionally, guests are able to reserve a room 3 days prior and 3 days after the conference at the group rate. To secure this special rate, call (504) 566-7006. Please be sure to mention the Federal Bar Association conference.

For full conference details visit www.fedbar.org/2013LEConf

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The Notice Process

Gathering the Information—Obligation of Plaintiff

Following the grant of conditional certification, the district court may, in its discretion, authorize the issuance of notice, requiring the defendant to produce basic contact information on potential collective action members, to the plaintiffs' counsel. While some courts order the production of more sensitive information, such as social security numbers, at a minimum, courts generally require the production of at least names, job titles, last known addresses, and email addresses. For cases involving a direct employer who is required by law to maintain this type of information for three years, gathering this information is a relatively quick and painless process.

While compliance with such an order poses no problem to a defendant with employment records, it can be an entirely different story for a putative employer with no direct relationship to the potential collective action members. However, as discussed above, the instances in which a joint employer allegation is often made involve subcontractors or employee leasing.

Typically, a general contractor will maintain quality control oversight, but specifically avoid details of its subcontractors' employment practices. Indeed, if a general contractor wanted that level of involvement, it would just have direct employees on the job. However, in this scenario, a general contractor may find itself required to produce contact information on individuals on whom it has never maintained any type of records for individuals, other than (possibly) a list of names from a crew sheet.

Because the FLSA allows an individual to choose to sue one or all of his putative employers, a defendant with viable defenses to a joint employer allegation can still find itself the sole defendant in a collective action and under a court order to produce contact information that it does not have.

In a scenario where the plaintiffs have elected to sue a general contractor or principal without adding the entity that has this information, plaintiffs should be required to affirmatively gather it themselves. It is well established in the class action context that the representative plaintiff is obligated to bear the costs associated with notice.[13] While these costs are generally confined to the preparation of and mailing of notice, in a case where the plaintiffs make a joint employer allegation, these costs will also likely include the funds associated with gathering contact information for potential collective action members. There are various tools at plaintiffs' counsel's disposal to track down potential collective action members' contact information, including radio and television advertisements, Westlaw/Lexis searches, Internet databases, and skip-tracing. However, many of these options can be costly, time-consuming, and often have low success rates.

The more likely, and effective, method is to issue subpoenas to third parties—most likely the entities with a direct employment relationship.

In situations where the plaintiffs are unable to gather the necessary contact information to properly disseminate notice, a court may determine that the notice process is a nonstarter and decertify the action, order notice to issue based on the information at hand, or order that the burden of gathering this information should shift to the defendant.

Gathering the Information—Obligation of Defendant

If the Court decides to shift the burden to the defendant, it may simply agree to provide gather the contact information and produce it. Indeed, it might be fairly easy to do so. But, what if it is not?

Federal Rule 34 and interpretive jurisprudence generally govern what documents a defendant is obligated to produce. In other words, even if the defendant does not technically have the information, it can fight the court order and require the court to make a determination of whether it has custody or control of the documents or information requested.[14] Not only that, the defendant should also note the potential risk of ordering a defendant to obtain personal identifying information of individuals with whom it has no direct relationship (and who did not provide this information to the entity) and then turn it over to plaintiffs for use in the notice process.[15] Indeed, most employment releases provide that personal identifying information are only to be used for limited purposes.

If the court determines that the defendant is not required to gather or produce the information, the requisite contact information (if it exists) will have to be obtained from third-parties who may or may not be subject to the jurisdiction of the court. And, the burden of obtaining that information may be extremely costly and time-consuming.

Gathering of Third-Party Information—Timing

No matter who ultimately takes on the task (and bears the cost) of issuing subpoenas, this process will necessarily add time and expense to the notice procedure. Even assuming that there is no objection to the subpoenas, the served entities are still entitled to a reasonable time to produce the information, if they have it at all. And, if there are objections, this can require motion practice in different jurisdictions.

The additional time to gather this information will likely form the basis of a Motion for Extension of the Opt-In Period, or permit the filing of supplemental notices—neither of these are attractive scenarios for either party.

Best Practices

The continued rise in collective action filings, along with the targeting by the Department of Labor of industries where the potential for a joint employer allegation is high, makes it advisable to plan for and avoid the scenario described above.

At a minimum, it is advisable for either (or both) parties to identify this issue for the court so if the court authorizes notice, it will not (necessarily) issue its standard order requiring the production of contact information. Instead, the court may order the parties to brief the issue of who is required to obtain contact information or to confer about how the costs associated with notice should be borne.

The parties should also try to agree on the type of contact information to be turned over. For example, an order requiring the production of dates of birth and social security numbers raises serious civil and criminal implications.

As in most areas of litigation, open and early discussion of those issues with clients and opponents can help mitigate some of those concerns. And, noting the issues for the court will assist in preventing the notice period from stalling and allowing the case to proceed to merit-based discovery and motion practice. ■

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Endnotes

[1] 29 U.S.C. § 202(a) (currently $7.25).

[2]29 U.S.C. § 207(a)(1).

[3]29 U.S.C. § 211(c); 29 C.F.R. § 516.1.

[4]29 U.S.C. § 216(b).

[5] *Id*.

[6]*Halferty v. Pulse Drug Co., Inc.*, 821 F.2d 261, 264 n.2 (5th Cir. 1987).

[7]29 U.S.C. § 203 (d).

[8]Courts generally examine the following factors: (1) who provided the equipment the employee used; (2) whether the employee was economically beholden to the protective employer; (3) the level of skill employed by the workers; (4) whether the putative employer had an ownership interest in the subcontractor; (5) the degree to which the employee's efforts were supervised; (6) whether the employee worked predominantly for the putative employer; (7) who set the terms and conditions of the employment; and (8) who maintained the employment records regarding the employee. *See Zheng v. Liberty Apparel Company, Inc.*, 355 F.3d 61, 74 (2nd Cir. 2003); *Morcon v. Air France*, 343 F.3d 1179, 1188 (9th Cir. 2003); *Watson v. Graves*, 909 F.2d 1549, 1553 (5th Cir. 1990).

[9]*See Trantham v. American Cable & Telephone, Inc.*, 2009 WL 3299816, at * 1-2 (M.D. Fla. Oct. 13, 2009) (holding that dismissal was not appropriate where plaintiff failed to join his direct employer as a party defendant because the direct employer was not an indispensable party and the question of defendant's FLSA liability was not implicated by contractual relationship between direct employer and defendant).

[10]*See generally* William C. Martucci and Jennifer K. Oldvader, Addressing the Wave of Dual-Failed Federal FLSA and State Law "Off-the-Clock" Litigation: Strategies for Opposing Certification and a Proposal for Reform, 19 KAN. J.L. & PUB. POL'Y 433, 433 (2010).

[11]The propriety of the Lusardi two-step process is currently being challenged before the U.S. Court of Appeals for the Fifth Circuit in *Wells Fargo Bank, N.A., et al., v. Richardson*, No. 12-20605 (5th Cir. filed Sept. 4, 2012). The petitioners in *Richardson* contend that the *Lusardi* method is improper because it allows opt-in plaintiffs to join the class before the court makes a factual determination as to whether representative adjudication is possible. Despite these criticisms, *Lusardi* currently remains the method that most courts use in deciding whether to conditionally certify a collective action.

[12]*Clay v. Huntington Ingalls Inc.*, Order and Reasons, pp. 11-13, entered 9/29/11, [R. Doc. No. 109], (USDC, E.D. La., No. 09-7625); *McKnight v. D. Houston, Inc.*, 756 F. Supp. 2d 794, 802 (S.D. Tex. 2010); *Bowman v. Crossmark, Inc.*, No. 09-16, 2010 WL 2837519, at *5 (E.D. Tenn. July 19, 2010); *Bunyan v. Spectrum Brands, Inc.*, No. 07-0089, 2008 WL 2959932 (S.D. Ill. July 31, 2008).

[13] It is a well-settled principle that a "representative plaintiff should bear all costs relating to the sending of notice because it is he who seeks to maintain the suit as a class action." *Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340 (1978). In *Sanders*, the Supreme Court held that the plaintiffs should bear the $16,000 expense required for a transfer agent to compile a list of names and addresses of potential class members. *Id*. at 359. The Court also held that it was an abuse of discretion to require the defendants to bear this expense because the task could be accomplished by hiring the transfer agent, a third party, and the expense of such hiring would be no greater for plaintiffs than defendants. *Id*. The court went on to "caution that courts must not stray too far from the principle underlying *Eisen* … that the representative plaintiff should bear all costs relating to the sending of notice because it is he who seeks to maintain the suit as a class action." *Id*.

[14]A party seeking production of documents bears the burden of establishing the opposing party's control over those documents. *United States v. Int'l Union of Petro. & Indus. Wkrs.*, 870 F.2d 1450, 1452 (9th Cir. 1989) (International Union did not control local union because they were considered separate organizations under the contractual agreement between the entities). Moreover, "[t]he fact that a party could obtain a document if it tried hard enough and maybe if it didn't try hard at all does not mean that the document is in its possession, custody, or control; in fact, it means the opposite." *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427 (7th Cir. 1993).

[15]*See* New York Social Security Number Protection Law, N.Y. Gen. Bus. Law 399-dd (2006); and Tex. Bus. & Com. Code Ann. § 72.004 (requires a business to destroy documentation containing personal identifying information, such as the individual's Social Security number, in such a way as to make the information unreadable or undecipherable).

Worker Misclassification: A Pressing Issue for the Federal Government

By Judson D. Stelter

The federal government is continuing its full-court press on employers that have misclassified employees as independent contractors; and it is pressing on multiple fronts. The Department of Labor (DOL), Internal Revenue Service (IRS), and U.S. Congress have all been extremely active on this issue in the past year. The message for employers is clear: *watch your step*.

Department of Labor

Despite the resignation of Secretary of Labor Hilda Solis on Jan. 9, 2013, all signs indicate that the DOL will continue with its Misclassification Initiative, which was launched in 2011 to prevent, detect and remedy employee misclassification.[1]

Indeed, on Jan. 11, 2013, the DOL announced a proposal to conduct a study "to collect information about employment experiences and workers' knowledge of basic employment laws and rules so as to better understand employees experience with worker misclassification."[2] At present, the study's budget provides for extended interviews with 10,060 workers. The DOL stated that this is the first time that it will field a survey to examine worker classification.

The DOL is also continuing its efforts to reach out to state governments for cooperation with cracking down on worker misclassification. On Jan. 17, 2013, the DOL entered into a memorandum of understanding with the state of Iowa to combat worker misclassification.[3] Iowa is now the 14th state to enter into such an agreement. California, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Utah and Washington have signed similar agreements with the DOL. In addition, as has been widely reported, the DOL entered into an memorandum of understanding (MOU) with the IRS in September 2011 in order to share information to reduce the incidence of misclassification of employees, to help reduce the tax gap, and to improve compliance with federal labor laws.[4]

The DOL's efforts have been productive, and the effects for employers can be sobering. For example, the Internet-based information service company kgb. recently consented to the entry of a federal court judgment to pay $1.3 million in unpaid minimum wage and overtime wages in settlement of claims brought by the DOL.[5] In another example, Aspen Power of Lufkin, Texas, was required to pay more than $485,000 in overtime back wages following a DOL investigation.[6] And in yet another example, five companies that had contracted with Nissan to perform work at its Smyrna, Tenn., plant were required to pay, collectively, $787,548 in back wages for a number of issues related to misclassification of workers. The DOL reports that since 2011, its Wage and Hour Division has collected roughly $9.5 million in back wages.[7]

Internal Revenue Service

The IRS, long interested in cracking down on misclassified workers, has also been very active on this front, albeit with somewhat of a more conciliatory approach. In Fall 2011, the IRS announced its Voluntary Classification Settlement Program (VCSP).[8] The VCSP is available for taxpayers who want to voluntarily change the prospective classification of their workers.[9] 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 participate in this voluntary program, the taxpayer must meet certain eligibility requirements and apply to participate in the VCSP by filing Form 8952, Application for Voluntary Classification Settlement Program, and enter into a closing agreement with the IRS.

In exchange for agreeing to prospectively treat the class or classes of workers as employees for future tax periods, the taxpayer will:

- only be required to pay 10 percent of the employment tax liability that would have been due on compensation paid to the workers for the most recent tax year (determined under the reduced rates of § 3509(a) of the Internal Revenue Code);
- not be liable for any interest and penalties on the amount; and
- not be subject to an employment tax audit with respect to the worker classification of the workers being reclassified under the VCSP for prior years.

When initially announced, the VCSP provided that, in order to be eligible for the program, an employer must: (1) consistently have treated the workers in the past as nonemployees, (2) have filed all required Forms 1099 for the workers for the previous three years, (3) not currently be under audit by the IRS, and (4) not currently be under audit by the DOL or a state agency concerning the classification of these workers. In addition to these eligibility requirements, the IRS required the taxpayer to extend the period of limitations on employment tax liability (from three years to six years) to obtain the relief.

In December 2012, however, the IRS announced two significant changes to these requirements.[10] First, the revised VCSP now permits a taxpayer under IRS audit—other than an employment tax audit—to be eligible to participate in the program. Second, the IRS eliminated the requirement that a taxpayer agree to extend the period of limitations on assessment of employment taxes as part of the VCSP closing agreement with the IRS.

In addition to these changes, the IRS announced a VCSP Temporary Eligibility Expansion (VCSP TEE) program.[11] As the name suggests, VCSP TEE is temporary and only available to employers who apply on or before June 30, 2013. The VCSP TEE makes a modified VCSP available to taxpayers who would otherwise be eligible for the current VCSP, but who have not filed all required Forms 1099 for the previous three years with respect to the workers to be reclassified. Like the VCSP, the VCSP TEE permits eligible taxpayers to voluntarily reclassify their workers as employees for federal employment tax purposes.

A taxpayer participating in the VCSP TEE will agree to prospectively treat the class or classes of workers as employees for future tax periods. In exchange, the taxpayer will:

- pay 25 percent of the employment tax liability that would have been due on compensation paid to the workers for the most recent tax year (determined under the reduced rates of § 3509(b) of the Internal Revenue Code);
- not be liable for any interest and penalties on the liability;
- pay a reduced, graduated penalty for unfiled Forms 1099 for the previous three years for the workers being reclassified; and
- not be subject to an employment tax audit with respect to the worker classification of the workers being reclassified for prior years.

In addition to these requirements, the taxpayer must certify as part of the VCSP TEE closing agreement with the IRS that it has furnished to the workers and has electronically filed all required Forms 1099, as instructed by the IRS, for the previous three years.

U.S. Congress

In March 2012, Rep. Jim McDermott (D-Wash.) introduced the Fair Playing Field Act of 2012 (FPFA).[12] Former Sen. John Kerry (D-Mass.) also introduced an analogous bill in the Senate at roughly the same time.[13] This was not the first time these bills were put before Congress. Both were introduced in 2010, but ultimately stalled.

The primary purpose of both bills is to eliminate prospectively a safe harbor provision in the tax code for employers that have misclassified employees as independent contractors. This safe harbor, which is found in § 530 of the Revenue Act of 1978, permits an employer to treat workers as independent contractors for employment tax purposes, provided that the employer has a "reasonable basis" for doing so, and it has consistently treated the workers as independent contractors by regularly filing Form 1099s.

Currently, the bills have again stalled in committee in both houses. Nevertheless, the efforts of Rep. McDermott and former Sen. Kerry to renew the bills in 2012 show the intent of lawmakers to legislate on the issue of worker misclassification. In addition, these bills may yet find new life in President Obama's second term.

Not to be outdone by his Democrat colleagues, Rep. Erik Paulsen (R-Minn.) introduced a bill on Dec. 12, 2012, known as the Independent Contractor Tax Fairness and Simplification Act (ICTFSA).[14] The ICTFSA is similar in many respects to the FPFA and seeks to eliminate prospectively the § 530 safe harbor provision for employers. The ICTFSA, however, would create a new type of safe harbor if the following criteria are met:

- the worker incurs significant financial responsibility for providing and maintaining equipment and facilities to perform work under a contract;
- the worker incurs unreimbursed expenses or risks income fluctuations because remuneration is directly related to sales or other output rather than solely to the number of hours actually worked or expenses incurred;
- the worker is compensated on factors related to the work performed and not solely on the basis of hours or time expended; and
- the worker substantially controls the means and manner of performing the contract services, the specifications of the service recipient or payor, and any additional contractual requirements.

Only time will tell whether the ICTFSA or the FPFA will gain traction. Regardless, the indications appear clear that worker misclassification will likely remain an area of focus for Congress. ■

Conclusion

Worker misclassification is an age-old problem, but the federal government's multi-faceted approach is new and evolving rapidly. It is apparent that the DOL, the IRS, and Congress will continue to vigorously pursue employers that have misclassified workers as independent contractors.

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Endnotes

[1]www.dol.gov/whd/workers/misclassification/

[2]Proposed Information Collection Request for the Worker Classification Survey, 60 Fed. Reg. 2447-2449 (Jan. 11, 2013), available at www.gpo.gov/fdsys/pkg/FR-2013-01-11/html/2013-00389.htm.

[3]Partnership Agreement between the US Department of Labor, Wage and Hour Division, and the State of Iowa, available at www.dol.gov/whd/workers/MOU/ia.pdf.

[4]Memorandum of Understanding between the Internal Revenue Service and the US Department of labor, available at www.dol.gov/whd/workers/MOU/irs.pdf.

[5]*Solis v. KGB USA, Inc.*, no. 5:13-cv-00227 (E.D.N.Y. Jan. 15, 2013).

[6]www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=Southwest/20120530.xml.

[7]www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=national/20130117.xml.

[8]IRS Announcement 2011-64, available at www.irs.gov/irb/2011-41_IRB/ar03.html.

[9]IRS Voluntary Classification Settlement Program, available at www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Voluntary-Classification-Settlement-Program.

[10]IRS Announcement 2012-45, available at www.irs.gov/irb/2012-51_IRB/ar16.html.

[11]IRS Announcement 2012-46, available at www.irs.gov/irb/2012-51_IRB/ar17.html.

[12]H.R. 6128.

[13]S. 2145.

[14]H.R. 6653.