

CALIFORNIA CRACKS DOWN ON THE TREATMENT OF INDEPENDENT CONTRACTORS

It has always been one of our goals to pass on relevant information to you as it becomes available.

We believe the information attached is just that and we recommend that you read the attachment carefully as it could impact your current business.

On October 9, 2011, Governor Jerry Brown signed California Senate Bill 459 ("SB 459"), which imposes steep penalties on employers who willfully misclassify employees as independent contractors. This has always been a hot button at both the Federal and State levels and it is not surprising that this legislation was passed.

Please call White Nelson Diehl Evans LLP if you have any questions.

INFORMATION REGARDING CALIFORNIA SENATE BILL 459

SB 459 is effective January 1, 2012. The statute does not indicate whether this legislation was intended to apply retroactively, so enforcement will likely be prospective only. The statute of limitations for the recovery of SB 459 penalties, whether pursued under the statute itself or via other means, should be limited to one year. At the federal level, the IRS is conducting random audits, and businesses found to have misclassified their workers presently face a fine of up to \$5,000 per misclassified employee.

California Senate Bill 459 makes it unlawful:

- to willfully misclassify an individual as an independent contractor; or
- to charge a willfully misclassified contractor a fee or make any deductions from compensation for any purpose including for goods, materials, space rental, services, government licenses, repairs, equipment maintenance or fines.

California Senate Bill also:

- Imposes a civil penalty of between \$5,000 and \$15,000 for each violation;
- Increases the civil penalties to between \$10,000 and \$25,000 if the employer has engaged, or is engaging, in a pattern or practice of such violations;
- Provides for the Contractors State License Board to initiate disciplinary action against any licensed contractor that violated the Act;
- Provides for joint and several liabilities for any person, other than an attorney or an employee providing advice to his or her employer, who knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for that individual if the contrary is found to be true.

Consequences

It should go without saying that this new bill will cause employees to attempt to recover any penalties imposed:

1. Aggrieved employees can bring a representative action on behalf of all other current and former employees to recover civil penalties in the Labor Code that may be assessed by the LWDA. This may include civil penalties under SB 459.
2. Also, although an employee would not be able to recover SB 459 penalties via California's Unfair Competition Law, the employee could use the UCL to seek injunctive relief.

Recommendations

In light of federal initiatives and California's enactment of SB 459, employers should consider taking various steps to evaluate their existing independent contractor relationships:

- Develop and publish a corporate policy on the engagement of independent contractors and the management of those relationships. As part of this policy, require that approval be obtained from a knowledgeable employee before any independent contractor relationship is established.
- Train employees who manage independent contractor agreements as to how to work with independent contractor relationships.
- Ensure that the company has a well-written independent contractor agreement for each contractor, that it is accurate, complete, and individually negotiated.
- Audit the company's independent contractor relationships, including a review of any past decisions or determinations concerning independent contractor status.
- Obtain a written legal opinion from counsel regarding the appropriateness of the classification of workers as independent contractors, based on counsel's understanding of the specific factual situations at issue.

There are many other facts and circumstances that exist with SB 459. Please contact your White Nelson Diehl Evans LLP service provider, should you have specific questions.