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EMPLOYMENT LAW DIGEST

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Department of Labor Announces Major Shift in Strategy for Enforcing Federal Laws

The United States Department of Labor ("DOL") recently announced a dramatic shift in strategy regarding how it regulates employers' compliance with certain federal laws. Within the next year, it will issue regulations requiring employers to take affirmative steps to ensure compliance with federal wage-and-hour, safety, and anti-discrimination laws. These new requirements for employers are similar in nature to those currently imposed upon employers doing business with the federal government.

Although many employers are proactive, instituting policies compliant with wage-and-hour, safety, and anti-discrimination laws, some companies pay little or no attention at all to compliance with labor laws. The DOL, however, has made it clear that the latter approach will no longer suffice. In announcing its regulatory agenda, the DOL declared its belief that too many businesses are playing a dangerous game of "catch me if you can," putting workers' rights and lives at risk. The DOL's new strategy, dubbed "Plan, Prevent, Protect," places the onus for federal compliance squarely on the shoulders of employers. Under the new strategy, employers must demonstrate to the DOL, and also their employees, that they are affirmatively complying with federal wage-and-hour, job safety and anti-discrimination laws.

Implications of the "Plan, Prevent, Protect" Strategy

As the title of the strategy suggests, the DOL will focus on three components. The "Plan" component means that employers will be required to create plans and processes that assess and demonstrate compliance with the federal labor laws. The DOL is considering requiring employers to work with employees in the creation of

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these plans and, at the very least, employers will be obligated to distribute the plans to employees so that they can fully understand the plans and monitor their employers' compliance. The "Prevent" component means that employers will be required to implement the plans and demonstrate to the workers that the plans are actually in use. And, the "Protect" component means that employers will be required to designate certain workers to be charged with implementing plans and evaluating their effectiveness.

For example, many employers struggle with the issue of properly classifying workers as either "exempt" or "non-exempt," for receipt of overtime wages, for purposes of the wage and hour laws. Another common problem area is the use (and abuse) of independent contractors. Under the new "Plan, Prevent, Protect" program, an employer seeking to comply with federal wage-and-hour laws may be required by the new strategy to: (i) analyze each exempt job classification as well as each independent contractor position, including in collaboration with individual workers holding those positions, (ii) document the employer's justification for finding that the workers are properly classified as exempt or independent contractors, as applicable, (iii) maintain records demonstrating the employer's analysis of the classifications, (iv) provide records to the employer's workers so that the workers can assess whether they agree with the classification analysis, and (v) conduct management training to ensure that managers are appropriately trained to understand the differences between exempt and non-exempt employees and independent contractors.

Similarly, an employer seeking to comply with federal safety laws may be required by the new strategy to: (i) audit the employer's relevant safety and health information, (ii) develop procedures for inspecting the workplace for safety and health hazards and investigating accidents, (iii) develop written plans, possibly in conjunction with workers, to improve safety and demonstrate to workers that the plans have been implemented, (iv) circulate safety plans to workers so that they can understand the plans and monitor their employers' compliance, (v) designate workers to monitor and evaluate the success of their employer's compliance with the plans, (vi) conduct management training on safety issues to ensure that managers are aware of and able to implement the plans they create, and (vii) create injury and illness prevention programs.

Finally, an employer seeking to comply with federal anti-discrimination laws may be required by the new strategy to: (i) draft, implement and disseminate a policy prohibiting discrimination, harassment and retaliation on the basis of protected categories, and (ii) conduct management training sessions to teach managers about their employer's anti-harassment/discrimination policy and how to avoid the appearance of discrimination, harassment or retaliation.

Goals of the New Strategy

Related to the implementation of the "Plan, Prevent and Protect" strategy, the

Employee Misclassification Prevention Act, recently introduced to Congress, directs the DOL to perform misclassification audits, and further requires employers to maintain records concerning the classification of independent contractors, notify workers of their classification and provide information on what to do if they feel they have been misclassified. The DOL, apparently unwilling to wait and see if Congress will pass this proposed legislation, may effectively bypass Congress through regulatory enforcement of the "Plan, Prevent and Protect" strategy. The DOL's stated goal of "Plan, Prevent and Protect" is to increase employer compliance and promote openness and transparency for workers in the workplace. While the new strategy will likely increase employer compliance with federal laws, undoubtedly it also will impose significant burdens on employers that distract from the core purpose of their businesses while at the same time encouraging workers — especially those who may already be litigious — to file complaints with the DOL or bring civil lawsuits against their employer for perceived violations of the new regulatory scheme.

Be Prepared

Given the DOL's announced intentions, employers are best advised to be prepared! First steps are to conduct workplace audits of company wage-and-hour policies and practices, specifically with regard to the classification of workers, and reclassify any workers possibly misclassified; audit safety policies and practices; audit anti-discrimination policies and practices; implement and distribute policies prohibiting harassment, discrimination and retaliation; and conduct regular management trainings in federal wage-and-hour, safety. and anti-discrimination laws.***

Federal Contractors Now Required to Notify Employees of Right to Unionize

President Obama recently signed an executive order concerning notification of employees of their rights under the National Labor Relations Act (NLRA). This executive order, entitled "Notification of Employee Rights under Federal Labor Laws," directs all federal contractors to post a notice informing employees of their rights under the NLRA. The order expressly revokes Executive Order 13201, which was issued by former President Bush in February 2001. Executive Order 13201 required federal contractors and subcontractors to post notices advising employees that they were *not* required to join a union or maintain membership in a union to retain their jobs, but did not require the notice to include information of an employee's right to join a union or any other rights under the NLRA.

The new executive order directs the Secretary of Labor to determine the form and content of the requisite notice and any related rules governing the implementation of the order within 120 days of the order's effective date. The order also directs the Federal Acquisition Regulatory ("FAR") Council to implement the requirement that each solicitation of offers for a government contract include the requisite notice.

Failure to comply with these posting requirements may result in the cancellation, termination, or suspension of federal contracts. Contractors may also be declared ineligible for future government contracts.***

IRS Launching Crackdown on Misclassification of Employees as Independent Contractors

In an effort to identify and capture lost tax revenue, the Internal Revenue Service (IRS) has announced that it will bring yet more scrutiny of businesses that use independent contractors to minimize labor costs. This year the IRS will audit 2,000 companies for compliance. If the 2011 budget is approved, the Internal Revenue Service will get the green light to add 100 more enforcement officers over a three-year time period. Federal government studies indicate that federal coffers will gain $7 billion over a 10-year span as IRS auditors crack down on companies that have misclassified employees as independent contractors and collect employment taxes and penalties from the businesses involved.

The IRS selects companies by statistical sampling, and small businesses are just as likely to be audited as large corporations. If you think the classification of your employees could be wrong, conduct an audit/analysis as soon as possible. Don't take any chances. The tax code is vague, the IRS' assessments are hard to predict and penalties accrue daily.

Workers in the United States are usually employees or self-employed workers - otherwise called contract workers. The contractor tax issue is not new; neither are the problems that occur as companies try to classify their workers correctly. Problems arise because there is no clear, universal definition of what constitutes a contract worker or independent contractor. The IRS' own reclassification frequently is made years after a worker has been hired.

Although there is no single question or element to analyze in determining whether someone is an employee or independent contractor, in general, the determination is made based on how much control the employer has over the scope of the job and the worker's exposure to costs and risk. For example, if a worker is required to come to the employer's place of business to work and be present for specific hours on specific days, he or she would most likely be classified as a payroll employee. If the IRS decides that a contract worker should have been classified as an employee, it could impose significant back taxes, interest and other penalties. These can be substantial and are owed to the IRS even if the contract workers paid their taxes in full. Unemployment taxes and overtime can be issues in this conundrum as well.

In assessing whether an individual is an employee or independent contractor, the IRS uses a 20-point test. The test is as follows:

1. Actual instruction or direction of worker. A worker who is required to comply with instructions about when, where and how to work is ordinarily an employee. The instructions may be in the form of manuals or written procedures that show how the desired result is to be accomplished.

2. Training. Training of a worker by an experienced employee working with him by correspondence, by required attendance at meetings and by other methods is a factor indicating control by the employer over the particular method of performance.

3. Integration of Services. Integration of the person's services in the business operations generally shows that he or she is subject to direction and control.

4. Personal Nature of Services. If the services must be rendered personally, it indicates an interest in

the methods, as well as the results. Lack of control may be indicated when the person has the right to hire a substitute with the permission or knowledge of the employer.

5. Similar workers. Hiring, supervising, and payments to assistants on the same job as the worker generally shows employer control over the job.

6. **Continuing Relationship.** The existence of a continuing relationship between an individual and the person for whom he or she performs services tends to indicate an employer-employee relationship.

7. Hours of work. The establishment of set hours of work by the employer bars the worker from being master of his own time, which is the right of the independent contractor.

8. **Full-time Work.** Full-time work required for the business indicates control by the employer since it restricts the worker from doing other gainful work.

9. **Work on Premises.** If the worker is required to do the work on the employer's premises, employer control is implied, especially where the work is of such a nature that it could be done elsewhere.

10. **Order of Performance.** If the order of the performance of services is, or may be, set by the employer, control by the employer may be indicated.

11. **Submitting Reports.** The submission of regular oral or written reports indicates control since the worker must account for his or her actions.

12. **Method of Payment.** If the manner of payment is by the hour, week or month, an employer-employee relationship probably exists; whereas, payment on a commission or job basis is customary where the worker is an independent contractor.

13. **Payment of Expenses.** Payment of the worker's business expenses by the employer indicates control of the worker.

14. **Tools and Materials.** The furnishing of tools, materials, etc., by the employer indicates control over the worker.

15. **Investment.** A significant investment by the worker in facilities used in performing services for another tends to show an independent status.

16. **Profit or Loss.** The possibility of a profit or loss for the worker as a result of services rendered generally shows independent contractor status.

17. **Exclusivity of Work.** Work for a number of persons at the same time often indicates independent contractor status because the worker is usually free, in such cases, from control by any of the firms.

18. **Available to General Public.** The availability of services to the general public usually indicates independent contractor status.

19. **Right of Discharge.** The right of discharge is that of an employer. An independent contractor, on the other hand, cannot be "fired" without incurring liability if he or she is producing a result that measures up to his contract specifications.

20. **Right to Quit.** The right to quit at any time without incurring liability indicates an employer-employee relationship.

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The punitive nature of penalties has caused many employers to convert contract positions into payroll employees - even though contractor labor might provide savings of up to 30 percent on labor costs. Companies do not pay Social Security, Medicare, sick leave, overtime, etc. for contract employees.

The technology sector, where the use of independent, self-employed contractors is especially common, has seen a wholesale shift from contractors to employees. Unlike other sectors where contract workers often would prefer the health and other benefits of payroll employment, technology contractors were willing to forgo employer-provided benefits for the chance to grow their own business and make money. These opportunities began to dry up a decade ago when industry leaders were found guilty of misclassification and hit with big fines. Microsoft paid $6 million in employment back taxes and penalties in 2000 when an IRS team discovered 12,300 cases of misclassification.

If contract workers are a part of your workforce, make sure they are not actually employees. For help in assessing an individual's status, contact a qualified labor and employment attorney. ***

If you, or anyone in your office, would like a copy of this newsletter on a quarterly basis, at no cost, please contact Deanna Jennings at (210) 824-8282.
E-mail copies are also available

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Keeping Employers Out of the Courtroom for over 20 Years

ABOUT THE FIRM

Holland & Holland L.L.C. Represents management in a wide variety of employment law matters. Our primary goal for clients will continue to be claims avoidance through timely advice and counsel before events occur which can lead to lawsuits. However our firm has significant experience in jury trial litigation in a wide variety of employment related claims in different venues throughout the great state of Texas.

Our expertise includes the following areas:

—**management counseling**

—review and preparation of **personnel policy** and procedures including employee handbooks;

—representation in administrative matters before the **Equal Employment Opportunity Commission**;

—**representation of management in state and federal court** for employment related claims involving Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Worker Adjustment and Retraining Notification Act, Consolidated Omnibus Budget Reconciliation Act, Polygraph Protection Act, and a variety state court causes of action such as retaliation, defamation, invasion of privacy, negligence, assault and battery;

—**protection of trade secrets** and other confidential information through the use of covenants not to compete and non-interference agreements;

—preparation of **arbitration agreements**, non-subscriber programs and waivers of jury trial agreements;

—**management training** on proper techniques on hiring, disciplining and discharging employees including seminars on recent Supreme Court decisions;

—general **human resource audits** to promote compliance with the myriad of legal and regulatory obstacles facing employers on a daily basis;

—**wage/hour compliance** audits and defense of FLSA collective actions.