Independent Contractors

OVERVIEW

Independent contractors are an important part of the construction industry due to its fluctuating work demands and are often the answer to a pressing demand for the special skills and know-how required for short-term projects.

Any independent contractor reform effort must recognize that independent contractors are necessary, productive participants in the construction industry and their ability to contribute to the marketplace must be preserved.

ABC SUPPORTS

- Efforts to provide a clear, concise and reasonable definition of independent contractors.
- Preservation of Section 530 of the Revenue Act of 1978, which provides a safe harbor for many businesses utilizing independent contractors.

ABC OPPOSES

- Any proposals to repeal Section 530 of the Revenue Act of 1978.
- Any proposals that would impede the flexibility of employers to utilize independent contractors.
- Any current or future policy or regulation that would require employers to generate burdensome classification analyses regarding workers' status under the Fair Labor Standards Act (FLSA). Such a requirement would merely serve as an enforcement tool and fuel frivolous litigation.
- Any legislative proposals that would also curb legitimate use of independent contractors by requiring federal income-tax withholding on payments made to independent contractors.

BACKGROUND

Determining whether a worker is an employee or an independent contractor often is difficult. Internal Revenue Service (IRS) and state guidelines for classifying workers as independent contractors are often ambiguous and inconsistent. When the IRS or a state agency rules an employer incorrectly classified an employee as an independent contractor, the employer may be liable for thousands of dollars in fines, back-taxes and benefits.

Companies must be able to make good faith, reasonable decisions about the classification of individuals as employees or independent contractors without fear of misclassification or penalty from the IRS. Section 530 of the Revenue Act of 1978 created a safe harbor provision that provides an employer with some protection from liability for accidental misclassification if the employer acted with a reasonable basis and treated workers consistently. Over the years, there have been several legislative proposals that would eliminate the Section 530 safe harbor. ABC opposes these efforts.

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In April 2014, the Obama administration's 2015 budget proposal dedicated nearly $14 million to pursue worker misclassification and enforcement efforts by the Department of Labor's (DOL) Wage and Hour Division (WHD). WHD funds are intended to strengthen and coordinate federal and state efforts to crack down on what the agency believes is misclassification of independent contractors.

The Obama administration also has expressed an interest in promulgating a rulemaking referred to as "Right to Know," in which employers would be required to provide workers classified as independent contractors with individualized, written "classification analyses" that detail their classification under the FLSA. In addition, employers would be required to provide written justification for workers' status as exempt/non-exempt on a rolling basis. ABC is concerned that such a complex rulemaking would significantly burden employers, serve merely as an enforcement tool, and increase the number of FLSA lawsuits concerning exemption and misclassification issues. The rule was listed in the "Long-Term Action" section of the most recent regulatory agenda. However, due to President Obama's March 2014 directive to DOL to propose revisions to existing overtime regulations, there is some speculation that DOL resources will be diverted from "Right to Know." ABC will continue to monitor DOL activity on these issues.