

## Management Alert

# Senate HELP Committee Debates Bill That Would Impose Substantial New Burdens and Risks on Companies Using Independent Contractors

On June 17, 2010, the Senate Committee on Health, Education, Labor and Pensions conducted a hearing on the Employee Misclassification Prevention Act, S. 3254 (EMPA). The bill, which was introduced by Sen. Sherrod Brown (D-Ohio) on April 22, 2010, seeks to amend the Fair Labor Standards Act in several significant respects relating to the classification of workers as employees or independent contractors. The proposed legislation would:

- Require employers to keep records of persons treated as independent contractors with respect to the hours worked by such individuals and the remuneration paid to them;
- Require employers to maintain a record of the classification of each worker as an independent contractor or employee and to provide written notice of such classification to the worker, along with other notifications specified by the bill;
- Provide for penalties to be imposed on businesses of up to \$1,100 per person for violations of the recordkeeping requirements or for misclassifying workers as independent contractors, and up to \$5,000 per person if the violation is found to be repeated or willful;
- Provide for a presumption that any worker for whom the required records are not maintained is an employee of the company, which could only be rebutted by clear and convincing evidence that the worker is an independent contractor;
- Provide for treble damages for willful violations of minimum wage and overtime requirements if the affected employee was misclassified as an independent contractor;
- Require the secretary of labor to create a website that explains the rights that a person misclassified as an independent contractor may have and that would enable workers to file complaints online;
- Provide for information sharing and coordination between the Internal Revenue Service (IRS) and the Department of Labor (DOL) with respect to misclassification issues; and
- Restrict federal grants to state unemployment compensation systems unless the state has an auditing and investigation program that identifies employers not reporting compensation for unemployment compensation purposes.

In prepared remarks, Seth Davis, Deputy Secretary of DOL, made clear that DOL and the Obama Administration strongly support EMPA. Mr. Davis also noted that DOL's Wage and Hour Division is actively considering a rule that would require employers, before classifying a worker as an independent contractor, to perform a written analysis of the worker's status under applicable FLSA precedent, to provide a copy of the analysis to the worker, and to maintain a record of the analysis in the company's files.

Opponents of EMPA remarked that the proposed legislation would impose enormous costs on owners of small businesses. Sen. Mike Enzi (R-Wyoming) estimated that it would cost billions of dollars for small businesses to comply with the recordkeeping requirements and would, for example, nonsensically require employers to notify employees that they were employees. He also noted that the audits would focus on recordkeeping rather than misclassification and fine employers simply for failing to keep proper records.

Although not the subject of the June 17 hearing, EMPA has been linked to the Taxpayer Responsibility and Consistency Act (TRCA), which was introduced by Sen. John Kerry (D-Massachusetts) on December 15, 2009. TRCA would amend §530 of the Internal Revenue Code in ways that would effectively remove the availability of the Code's Safe Harbor provisions to all but a very few employers. The §530 Safe Harbor was originally enacted in the late 1970s to protect businesses that were relying on their industry's long-standing practice of using non-employee workers for the performance of certain services, or on prior IRS audits that made no determination that independent contractors were misclassified. The idea was that the Safe Harbor would be temporary until a new independent contractor standard could be developed that was clear and objective and could be reliably and consistently applied. Contrary to that intent, TRCA would eliminate the availability of §530, except in a very few cases, without the adoption of a law that made the determination of independent contractor status clear and objective.

These legislative efforts, together with increased funding and enforcement efforts applied at both the federal and state levels, provide clear evidence of the increased risks and potential liabilities imposed on companies that use the services of independent contractors. Now is the time for employers to examine their independent contractor relationships and determine whether changes need to be made to those relationships or to the company's practices in dealing with independent contractors. On July 13, Seyfarth Shaw LLP will present the next installment of its worker misclassification webinar series to assist companies in adapting to these increased challenges. This webinar will focus on governmental employment status audits and what companies should do to prepare for and respond to those investigations. More information on this webinar is forthcoming and will be available at [www.seyfarth.com/events](http://www.seyfarth.com/events).

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