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GOVERNOR SPITZER OF NEW YORK SIGNS EXECUTIVE ORDER TO PREVENT EMPLOYEE MISCLASSIFICATION

New York Governor Eliot Spitzer recently announced a new Executive Order creating a Joint Enforcement Task Force to address the issue of employee misclassification, which occurs when an employer, at hiring, improperly classifies a worker as an independent contractor rather than an employee. The task force will facilitate the sharing of information among various state agencies. Employers who misclassify workers will be investigated and may be subject to failure-to-file penalties, fraud penalties, higher tax assessments and tax rates, and periodic audits. The Order comes on the heels of a recent study conducted by the School of Industrial Labor Relations at Cornell University which estimates that approximately 10 percent of workers reviewed in audits conducted by the Department of Labor were misclassified.

The task force is aimed particularly at the misclassification of workers as independent contractors. Misclassified workers do not enjoy the protection of minimum wage, overtime, discrimination or occupational safety laws. They are also denied health and pension benefits. According to Governor Spitzer, employers that follow the law and properly classify employees are put at a competitive disadvantage since they bear the expense of paying unemployment insurance taxes, workers' compensation premiums and Social Security or Medicare taxes, while employers who misclassify employees avoid such costs.

The task force will coordinate the investigation and enforcement of employee misclassification requirements across all state agencies, including the State Department of Labor, Workers' Compensation Board, Attorney General, and Department of Taxation and Finance. Previously, enforcement had been divided among various agencies and violations were not shared with other relevant agencies. Now, enforcement efforts will be enhanced through interagency cooperation, information sharing and joint prosecution of serious violators. For example, if the State Workers' Compensation Board finds that a company is misclassifying its workers, it may now share that information with other departments, like the State Department of Labor, which has jurisdiction over, among other matters, wage and hour and overtime compliance. The task force will also identify potential violators from information received from the public through a telephone

In addition to facilitating the filing of complaints and identification of potential violators, the task force will report to the Governor annually on its accomplishments, including the amount of wages, premiums, taxes and other payments or penalties collected with its assistance, as well as the number of employers cited for misclassification. The task force will also report any administrative or legal barriers and propose administrative, legislative or regulatory changes.

Misclassification is not only an issue in New York State. Governor Jon S. Corzine announced a plan last summer to address misclassification of workers in New Jersey. To address the issue on a national basis, the Independent Contractor Proper Classification Act of 2007, introduced in the U.S. Senate on September 12, 2007, would close a gap in federal tax law and ensure that employers do not misclassify workers as independent contractors.

What Business Owners Can Do To Avoid Misclassification

Business owners may genuinely believe that they have engaged independent contractors, rather than employees. Proper classification will depend on the degree of supervision, direction and control exercised over the worker, not only as to the results, but as to the means, manner and methods of the services provided. The courts have found that no single factor or group of factors conclusively define the employee or independent contractor relationships. All factors must be examined to determine the degree of supervision, direction and control.

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According to the New York State Department of Labor, employer indicators of control may include:

- determining when, where and how services will be performed
- providing facilities, equipment, tools and supplies
- supervising the services directly
- stipulating the hours of work
- requiring exclusive services
- setting the rate of pay
- requiring attendance at meetings and/or training sessions
- requiring oral or written reports
- reserving the right to review and approve the work product
- evaluating job performance
- requiring prior permission for absences
- reserving the right to terminate the services

On the other hand, independent contractors are free from supervision, direction and control in the performance of their duties. They are in business for themselves, offering their services to the general public.

Indicators of independent contractor status may include:

- having an established business
- advertising in the electronic and/or print media
- maintaining a listing in the commercial pages of the telephone directory
- using business cards, business stationery, and billheads
- carrying insurance
- maintaining a place of business and making a significant investment in facilities, equipment and supplies
- paying one's own expenses
- assuming risk for profit or loss in providing services
- determining one's own schedule
- setting or negotiating own pay rate
- providing services concurrently for other businesses, competitive or non-competitive
- being free to refuse work offers
- being free to hire their own assistants

Caution is advised in light of the announced compliance effort. In this regard, to ensure proper classification, employers should review the New York State Department of Labor indicators of employer control and independent contractor status and conduct a self-audit of their workers to ensure they are operating properly and in full accord with applicable law.

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If you have any questions about classification of workers, please contact Dean L. Silverberg at (212) 351-4642 or dsilverberg@ebglaw.com, or Anna A. Cohen at (212) 351-4922 or acohen@ebglaw.com.

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorney in connection with any specific questions or issues that may impose additional obligations on you or your company under any applicable local, state or federal laws.

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