POLITICO ALERT

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California Supreme Court Adopts Broad New Misclassification Test

The California Supreme Court has adopted a new legal standard that will make it much more difficult for businesses to classify workers as independent contractors. Specifically, the court adopted a new standard for determining whether a company "employs" or is the "employer" for purposes of the California Wage Orders.

Under the new "ABC" test, a worker is considered an employee under the Wage Orders unless the hiring entity establishes all three of these prongs:

A) the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
B) the worker performs work that is outside the usual course of the hiring entity's business; and
C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

This decision not only expands the definition of "employee" under the California Wage Orders, it also imposes an affirmative burden on companies to prove that independent contractors are being properly classified.

From an industry standpoint, this decision is a seismic shift for California wage and hour law. The nonunion sector will have a much more difficult time classifying employees as independent contractors. The court now imposes a burden on businesses to defend their classification of workers as independent contractors. Misclassification of such workers will result in significant legal exposure with respect to wage and hour compliance.

Federal OSHA Reporting Requirement

Effective January 1, 2017, employers in states regulated by federal OSHA were required to electronically submit Log 300 records of injuries and illnesses. As this was a federal program change, state-run safety and health programs like CalOSHA were required to respond and comply to the change.

CalOSHA has not yet completed its review of this change.

However, on April 30, 2018, federal OSHA posted a "trade release" REQUIRING all affected employers to submit injury and illness data in the federal OSHA Injury Tracking Application (ITA) online portal, even if the employer is covered by a state plan that has not completed adoption of their own state rule.

Please review the following link: Log 300 Recording and Reporting Occupational Injuries and Illnesses, with Anti-Discrimination Provisions The links contained in the notice provide instructions on how to access the ITA.

Construction employers with a workforce from 20 -249 employees must report their log 300 information for the year 2017 through the ITA portal by July 1, 2018.

AB 450 Immigration Worker Protection Act

We are reminding contractors that in 2017 California passed a new law, the Immigration Worker Protection Act that prohibits employers from voluntarily cooperating with ICE. In brief, under the new law, employers are prohibited from allowing immigration enforcement agents into non-public areas of the workplace without a judicial warrant and from allowing ICE agents to access, review or obtain

employee records without a subpoena or judicial warrant. (There is an exception to this requirement for Notices of Inspection, which are generally letter requests for Form I-9s and sent to an employer at least 3 days in advance of the inspection). The new law also requires employers to provide their employees with certain written notices when the employer is notified that it will be inspected by ICE. (The Labor Commissioner is required to develop a template notice before July 1, 2018, which it will likely make available on its website). Employers who violate the new law will be subject to penalties ranging from $2,000 to $5,000 for first violations, and $5,000 to $10,000 for subsequent violations.

It's recommended that contractors educate their managers and any employees likely to encounter an ICE agent (such as receptionists, security officers, jobsite foremen, etc.) not to provide access to ICE agents unless they produce a judicial warrant, and not to voluntarily provide them with any employee records. Field employees should be advised to contact a foreman or management if approached by ICE, and to take a picture of any "official-looking" paperwork presented by ICE to send to a manager (if the manager is not present) or to your main office for review. Managers/foremen should also be instructed to contact upper management if approached by ICE, and to provide upper management with any "official-looking" documents presented by ICE. ICE agents should be politely told to wait in a public area (which may be outside or on the street, in some cases) until they have contacted upper management. ICE agents may act like they have the authority to demand access to employee records or non-public work areas without a warrant or subpoena, they do not—giving in to their demands when they do not have the proper documentation may subject the company to penalties.

If contractors are not doing so already, you should keep all Form I-9s in a separate file. (You can put a copy of the employee's Form I-9 in their personnel file as well). You should also be using the most recent Form I-9 for new hires. Following is a link to the current Form I-9 (released Jul. 17, 2017): https://www.uscis.gov/i-9

In early January, 2018, US Immigration and Customs Enforcement also updated its I-9 Handbook for Employers (available at https://www.uscis.gov/i-9-central/handbook-employers-m-274) which we suggest you print out for your office or jobsite use.

Conducting an I-9 audit, is also recommended.