Independent Streak: Understanding Maine’s New Independent Contractor Law

Elizabeth Connellan Smith, Esq.
esmith@verrilldana.com
History

2009, then - Governor Baldacci established Joint Taskforce on Employee Misclassification

- Goal was to streamline communication between various Agencies
- Reduce “adverse impact” on Maine business and economy
- Identify regulatory/statutory changes needed
AN ORDER ABOLISHING THE JOINT ENFORCEMENT
TASK FORCE ON EMPLOYEE MISCLASSIFICATION

WHEREAS, the Joint Enforcement Task Force on Employee Misclassification was established by Executive Order 23 FY 08/09, dated January 14, 2009;

WHEREAS, the classification of individuals either as “employees” or as “independent contractors” is a matter determined in the first instance by the Legislature, through statutory definitions;

WHEREAS, in the event of statutory ambiguity or factual disputes, Executive Department agencies through rulemaking and the courts through adjudication play a role in determining appropriate classifications of individuals;

WHEREAS, there is no need for a Task Force, an extra layer of bureaucracy, to take actions on a matter within the shared jurisdiction of the Legislature, the Executive Department and the Judicial Department;

WHEREAS, the existence of the Task Force on Employee Misclassification has created uncertainty within the business community; and

WHEREAS, any determinations made by the Task Force may be negated or altered by forthcoming legislation;

NOW, THEREFORE, I, Paul R. LePage, Governor of the State of Maine, hereby order as follows:

1. Executive Order 23 FY 08/09, dated January 14, 2009, is hereby rescinded, effective immediately.

2. The Joint Enforcement Task Force on Employee Misclassification is hereby abolished, effective immediately.

The effective date of this Executive Order is January 20, 2011.

Paul R. LePage, Governor
The General Characteristics

• Independent Contractor
  – Contract for work
  – Possesses skills and training to do job
  – Has distinct business
  – Performs services for many customers
  – Sets hours of work
  – Sets price for work
  – Provides tools and equipment
  – Provides materials and supplies
  – Hires own workers
  – Files self-employment taxes
The General Characteristics (cont.)

- **Employee**
  - Means and manner of work controlled by employer
  - May be trained on job
  - Works for one employer
  - Hours set by employer
  - Wages set by employer
  - Employer provides tools and equipment
  - Employer provides materials and supplies
  - Employer liable for injury
  - Employer pays necessary taxes on wages
What Are The Impacts of Misclassification?

- Unfair competitive edge
- Loss of legal protections
  - Unemployment
  - Tax
  - Workers’ Compensation
  - Wage (overtime, minimum wage)
  - Benefits
- Shifts costs to community
Independent Contractor in Construction

- Factors:
  - Possess a valid EIN or SSN
  - Control or discretion over means and manner
  - Control over time/project schedule
  - Hires, pays and supervises assistants
  - Holds self out as self-employed
  - Has ongoing construction business
  - Controls success or failure of business
  - Contracts for compensation
  - Responsible for expenses
  - Supplies tools and materials
  - Able to work for many clients
L.D. 1314-Required Criteria

• Must Meet These 5 Criteria:
  – Has essential right to control means and progress
  – Customarily engaged in established trade, occupation, profession or business
  – Has opportunity for profit or loss
  – Hires, pays and supervises assistants
  – Services available to customer community
L.D. 1314-Additional Criteria

- At Least 3 of the following:
  - Investment in tools, instruments and knowledge
  - Not required to work exclusively for other entity
  - Responsible for satisfactory completion and may be held contractually responsible for failure
  - Has a contract that defines relationship and give rights in case of termination
  - Payment based on factors directly related to work or not solely based on time worked
  - Work is outside the usual course of business for which the service is performed
  - Person has been determined to be IC by federal IRS
Penalties

- Knowing or Intentional Misclassification for Unemployment: civil fine of not less than $2,000 or more than $10,000 per violation
- Plus, up to $10,000 fine from WCB
What Didn’t Change?

• Maine Revenue Services
  – Still use common law rules as evidence of degree of control or independence
  – No greater weight for one than another
  – Three general categories:
    • Behavioral
    • Financial
    • Relationship
What Should You Do?

• Good time to self-audit and make sure all employees are properly classified
• Review any contracts used with independent contractors for compliance
• Review documentation kept on any contract workers
• Update policies on documentation