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SB 459: Policy and Penalties on Independent Contractor Misclassifications

Enhanced penalties and policy clarification are the hallmarks of California Senate Bill 459 (SB 459), which Governor Jerry Brown signed into legislation October 9, 2011 and went into effect January 1, 2012. SB 459 imposes new, steep penalties for those employers who willfully misclassify employees as independent contractors. Significant penalties are the growing trend at both the federal and state levels to deter companies from misclassifying employees.

SB 459 makes it unlawful "to willfully misclassify an individual as an independent contractor, or to charge a willfully misclassified contractor a fee or make any deductions from compensation for any purpose including for goods, materials, space rental, services, government licenses, repairs, equipment maintenance, or fines." (Source: Association of Corporate Counsel)

The act simply defines willful misclassification as a misclassification that is voluntary and knowing, which can be vague. The determining factor, whether at the federal or state level, is fact-specific and requires the decision maker to balance numerous factors. The most important factor is whether the presumptive employer has the right to control not merely a worker's results but the manner and means used to obtain those results.

Penalties as listed by SB 459 include a civil penalty between \$5,000 and \$15,000 for each violation. It does not state, however, what merits a \$5,000 penalty versus a \$15,000 penalty. This amount then increases for subsequent offenses to \$10,000 and \$25,000, especially if the employer has a pattern for such behavior. It also states that the Contractor's State License Board can initiate disciplinary action against any licensed contractor who has violated the act.

Also, any person or employer who has been found to have violated the Act must post a website notice (or display prominently if there is no website) stating they have been in violation and have changed practices to prevent further violations.

Regarding enforcement, SB 459 authorizes the Labor and Workforce Development Agency (LWDA) or a court to determine if an employer is in violation. It also states the Labor Commissioner can enforce the statute and assess penalties through Labor Code section 98 proceedings. Any individual is authorized to file a complaint to request the assessment of penalties, but does not allow for employees to do so.

Employees may need to file complaints through the California Labor Code Private Attorneys General Act (PAGA). Through PAGA, employees may represent themselves or for all current and former employees. Any penalties received by an employee are divided as follows: 75% to the LWDA and 25% to the employees.

Some recommendations in light of this new legislation may be to evaluate existing independent contractor relationships, develop and publish corporate policy on the matter, train all employees how to work with independent contractor relationships, and develop a well-written independent contractor agreement. Make sure it is accurate, complete, and individually negotiated. You may also wish to obtain written opinions or counsel regarding classifications.

More information is available than can be summarized in this update. We encourage you to discuss your particular situation with the tax and accounting professionals at KKAJ.



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