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# UPDATE:
# U.S. Department of Labor Increases Pressure to Reclassify Independent Contractor Workers

*By M. Christine Carty*

In September 2011, the U.S. Department of Labor announced a joint initiative with the Internal Revenue Service ("IRS") and 11 states[1] to share information and "coordinate law enforcement" for the purpose of ending "the practice of misclassifying employees in order to avoid providing employment protections." The joint enforcement program was almost immediately followed by the announcement by the IRS of its Voluntary Classification Settlement Program ("VCSP"). VCSP is a program that allows companies the IRS accepts for participation to reclassify workers as employees for employment tax purposes prospectively and to receive 90 percent amnesty on past due employment taxes, with no interest or penalties. We reported and commented on these developments in an *ALERT* in October 2011. What has been the effect of the implementation of these programs over the last nine months?

Since September 2011, the U.S. Department of Labor, Wage and Hour Division ("DOL") has stepped up the pressure on corporations to reclassify workers as employees, rather than independent contractors. Between December 2011 and February 2012, the DOL announced cooperation agreements with three more states: California, Colorado, and Louisiana.[2] These states each have entered into a three year Memorandum of Understanding ("MOU") with the DOL which specifies that broad categories of information, such as unemployment compensation information, identities and/or confidential "statements" of persons and internal opinions and recommendations by either the DOL or one of the state agencies, can be exchanged for purposes of enforcing laws within the purview of each agency.[3] Both the DOL and these states also agreed to insert hyperlinks to the websites of the other agency on their own sites and to exchange statistical information on violations in specific industries and geographic areas. This expansion of state cooperation obviously increases the scope of the information available to the DOL to initiate investigations and pursue enforcement, particularly with the added cooperation of California.

Since every MOU expressly permits the delivery of unemployment insurance information to the DOL by the partner states, companies should assume that their responses to unemployment insurance applications by independent contractors will be delivered to the DOL. Statements in such responses made by the company may constitute "admissions" in any investigation as to whether the workers are properly classified. We recommend that such responses be reviewed by counsel or, at least, be prepared by a single human resources professional who has been trained to provide accurate information using correct terminology.

The DOL is aggressively leveraging its new partnership with the states. Since September 2011, the DOL has announced three wide-ranging "initiatives" to identify misclassification: (1) in the construction industry in Connecticut and Rhode Island; (2) in the hotel and motel industry in Texas; and (3) in the nail salon industry in Seattle, Washington. Connecticut and Washington are both DOL partners. In February 2012, the DOL announced that, with the cooperation and assistance of the State of Connecticut under the MOU between the two, it had initiated a "multi-year enforcement initiative" in the construction industry

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1. Although it was announced in September 2011 that New York was one of the 11 states partnering with the DOL and the IRS, for reasons that have not been explained by the DOL, New York has not signed a Memorandum of Understanding. The DOL website states that New York is not a partner at this time.

2. The participating states currently are: California, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Utah, and Washington.

3. Notably, the information exchanged and prosecutorial cooperation extends beyond the Fair Labor Standards Act to the laws enforced by the Occupational Safety and Health Administration ("OSHA") and the Employee Benefits Security Administration.

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focusing on worker misclassification on large construction projects with a stated goal "to remedy systemic violations and promote sustained compliance." Also in February 2012, the DOL announced that, with the cooperation of the State of Washington, it had initiated an investigation of the nail salon industry in the Seattle area into misclassification of workers as "booth renters" using a series of "unannounced investigations." In Texas, where the DOL does not have a partnership with the state, the DOL announced in March 2012 an initiative to investigate misclassification of the hotel and motel industry in the Dallas/Ft. Worth area. In the press release announcing this initiative, the DOL stated that it would list on its enforcement database every hotel and motel investigated by the DOL together with the investigation results. These investigations could have a wide-ranging effect on employers in the targeted industries, particularly if the DOL prosecutes and broadly publicizes the results as it has announced it will do.

To maximize the impact of its aggressive activity, the DOL routinely trumpets settlements with or judgments against companies arising from misclassification of independent contractors. This seems particularly the case in those states that are part of the joint initiative with the IRS and the DOL to combat perceived misclassification. For example, the DOL announced in May 2012 that in Illinois it had obtained a $500,000 judgment, including $75,000 in civil penalties, against two Chicago cleaning companies that had misclassified 135 cleaners as independent contractors. In Massachusetts, the DOL announced in November 2011 that a real property and management company had misclassified painters, maintenance employees, electricians, plumbers, floor installers, and security guards as independent contractors and, as a result, would pay $250,000 in back wages to 42 workers. In Texas, the DOL announced in May 2012 that a power company would pay $485,000 in overtime wages to 135 workers who had been misclassified as independent contractors. The DOL website contains scores of press releases announcing settlements or judgments arising from misclassification, particularly in participating states.

By far the most interesting development over the last several months is the DOL's new "naming and shaming" strategy aimed at the hotel, restaurant, and retail sales industries using smart phone technology. An application for smart phones and iPads developed by a private web app developer for the DOL links the DOL enforcement database to a search application for individual hotels, motels, restaurants, and retail businesses. "Eat Shop Sleep"[4] for iPhones, iPads, and Android smart phones allows the user to search for places to eat, shop, and sleep, get directions to their locations, read customer reviews linked to Yelp, and review health, safety, and labor "highlights" prepared by the DOL, Wage and Hour Division and OSHA. In fact, the information supplied by the DOL is surprisingly comprehensive. A screenshot on the "Eat Shop Sleep" application sign-in page regarding a steakhouse restaurant states, under the heading "Child Labor and Fair Labor Violations," that the restaurant has "27 Fair Labor Violations" and that "26 employees are due $6,647.21 in back wages." The logo of the DOL, Wage and Hour Division appears on the screenshot below this information, clearly tying the violation statistics to the DOL. The application sign-in page invites "consumers in the know" to "narrow your results by health/labor violations" and to "view health/labor information from the Department of Labor on businesses at a glance on the U.S. map." An instruction video on the application sign-in page demonstrates that, in addition to all of the above, the user can access a copy of any DOL violations, sort by businesses not having DOL violations and contact the DOL or OSHA with a click.

Businesses found by the DOL to have misclassified workers as independent contractors invariably will be slapped with citations for overtime and other wage and hour violations, thus meriting an appearance on the "Eat Shop Sleep" application. A natural and no doubt intended consequence of listing the DOL violation information may well be that consumers who use the DOL sponsored "Eat Shop Sleep" application will select only "compliant" businesses, not having any violations, thus effectively pressuring businesses to clear violations promptly and avoid them altogether.

In addition, since September 2011, the DOL website has been revised to include a new, visually appealing page entitled "Misclassification of Employees as Independent Contractors" with attractive graphics and links to state laws and regulatory bodies dealing with classification and wage and hour issues. While the new page satisfies the DOL's obligation under the Memorandum of Understanding with the 13 participating states, the clear intent of the DOL is to make information about how to remedy perceived misclassification easily available.

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4. The catchy name for the application, "Eat Shop Sleep," may be a play on the title of the popular novel, *Eat, Pray, Love* by Elizabeth Gilbert. See, https://sites.google.com/site/eatshopsleepdol.

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The vigorous DOL activity nationally over the last several months demonstrates a determined effort to use both traditional investigation methods and new media to force the reclassification of workers in a variety of industries — construction, hair, nail and spa services, hotels and motels, and communications. The emphasis by the DOL and the partner states on joint education, and the use of links to numerous websites and the mobile app ("Eat Shop Sleep") signals an unprecedented effort to change public perception and harness public pressure to achieve reclassification.[5] Stay tuned. ◆

5. Another example of the DOL effort to change public perceptions is the persistent reference by agencies and labor unions to any form of misclassification as "wage theft." Indeed, both New York and California enacted "Wage Theft Prevention Acts" in the past two years, although both simply require employers to provide information to employees about rates of pay, employer contact information and the like. [Schnader October 2011 *ALERT* "California Governor Signs S.B. 459, Dramatically Increasing Penalties for Misclassifying Employees as Independent Contractors" and Schnader December 2010 *ALERT* "New York Acts Against "Wage Thieves," Multiplies Paperwork for All"]



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