

INDEPENDENT CONTRACTOR ALERT

In March of 2008, a federal judge ruled that 19 state lawsuits can proceed as class actions against a division of industry giant, FedEx. At issue is the company's classification and treatment of certain drivers as independent contractors rather than employees. Generally, the plaintiffs' lawsuits allege violations of state wage payment laws, fraud, unjust enrichment and similar claims. If the drivers are successful, FedEx may be forced to pay millions of dollars to drivers for lost wages, benefits and expenses. In addition, after receiving a driver's claim for unemployment benefits, the New York Department of Labor conducted an audit and concluded that certain FedEx drivers were actually employees rather than independent contractors. As such, FedEx may be required to pay the Department of Labor for unpaid unemployment insurance contributions. Finally, FedEx is facing an IRS audit with respect to its alleged improper classification of drivers which could result in FedEx paying employment taxes and penalties. An increasing number of employers are utilizing independent contractors rather than employees. However, as illustrated by the above-examples involving FedEx, the classification of workers as independent contractors involves certain risks. The purpose of this article is to reiterate the importance of properly classifying all individuals who perform services for your company.

In an apparent response to the increased use of independent contractors, the IRS, the federal Department of Labor, and individual state Departments of Labor all seem to be increasing their scrutiny of such relationships. These administrative agencies all have the ability to audit and/or investigate employers to ensure that workers are properly classified as independent contractors. In addition, employees or independent contractors may independently contact such agencies to question their classification by the employer. Such independent inquiries may trigger audits and/or investigations to determine whether the employer has properly classified its workers. An employer may face serious monetary and legal penalties if it incorrectly classifies a worker as an independent contractor rather than as an employee. To further complicate this issue, the "test" for determining whether a worker is an independent contractor or an employee varies. For example, courts use a different test in determining whether a worker is an independent contractor or an employee compared to the test used by the IRS. Similarly, individual states often have specific laws related to the classification of workers. Overall, the applicable agency or court will focus on the issue of "control." Otherwise stated, does the employer control the worker's duties or does the worker have control over the same? If the worker exercises control over the worker's performance of duties, the worker may generally be classified as an independent contractor. Conversely, if the employer directs and supervises the employee, such worker may be correctly classified as an employee.

Given the current attention focused on this issue, employers should carefully analyze their treatment of independent contractors before they are faced with a formal audit or inquiry. At a minimum, each employer should have a carefully drafted, signed independent contractor agreement with each independent contractor that complies with the applicable state and federal laws. Also, all aspects of the relationship between the employer and the worker should be carefully considered in an attempt to predict the outcome in case of a worker classification audit or challenge. Often, additional steps can be taken to support or bolster the employer's classification of workers.

Please contact a member of Koley Jessen's Employment, Labor and Benefits Group at www.koleyjessen.com to discuss and analyze your company's classification of workers as independent contractors.

DEPARTMENT OF LABOR RELEASES NEW POSTER INSERT FOR MILITARY FAMILY LEAVE
AMENDMENTS TO FAMILY AND MEDICAL LEAVE ACT

The Department of Labor ("DOL") has issued a "poster insert" that employers may use to meet their posting requirements concerning the recent family military leave amendments to the Family and Medical Leave Act ("FMLA"). All employers who are subject to the FMLA are required to post a notice that explains the FMLA's provisions and provides information concerning the procedures for filing complaints for violations of the FMLA. Employers who willfully violate the posting requirement may be assessed civil money penalties and cannot take any adverse action against an employee, including denying FMLA leave, for failing to furnish the employer with advance notice of a need to take FMLA leave. Additionally, if a significant portion of an employer's workforce is not literate in English, the employer must provide the notice in a language in which the employees are literate. The poster insert can be downloaded from the DOL's website at <http://www.dol.gov/esa/whd/fmla/NDAAAmndmnts.pdf> for the English version and at <http://www.dol.gov/esa/regs/compliance/posters/pdf/NDAAspan.pdf> for the Spanish version.