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## FARALLON LAW GROUP NEWSLETTER

(APRIL, 2010)

### Independent Contractor vs. Employee: Are Your Workers Classified Correctly?

According to government estimates, up to 30% of companies misclassify their workers as contractors rather than employees. Until now, there has been little widespread enforcement of these classifications initiated by government, though employee-initiated disputes always abound.

The Obama Administration has mandated a crack down on the misclassification of workers as independent contractors rather than employees. Over the next three years, the IRS will audit 6,000 additional companies and, if the Administration's 2011 budget is approved, 100 additional IRS auditors will aid these enforcement efforts. Substantial fines can be imposed on companies that misclassify workers. In the coming decade, the Administration expects to collect \$7 billion from such companies alone.

#### Independent Contractor or Employee?

With increased scrutiny, it is important that companies understand and obey the laws regarding worker classification and other applicable employment laws. No single factor will determine if someone is an employee or an independent contractor. Instead, regulators and the courts look at a combination of factors.

#### Factors defining an independent contractor include:

- The company does not control or direct day-to-day work including the **time, means or method** of accomplishing results.
- The engagement is a distinct, one-time project and not part of an ongoing relationship.
- The contractor has other clients and does not depend solely on one client for financial survival.

- The contractor has a chance of profit or loss from the decisions he/she makes about how to perform work.

#### Factors indicating employee status include:

- An employee is subject to day-to-day direction and control when performing the job.
- The job is part of an ongoing relationship, which may be a series of jobs all connected to the same client.
- The employer has first call on the employee's work time.
- An employee is typically paid for the time he/she works and is provided with or reimbursed for expenses, supplies and equipment.

The courts and individual states have joint jurisdiction over regulating these relationships. The consequence is a plethora of federal and state regulation, with often similar but rarely identical rules and obligations. Farallon Law Group can help:

- Classify service relationships;
- Draft agreements setting forth these relationships;
- Evaluate legal exposure in administrative enforcement proceedings and litigation involving potential misclassification issues.

Even if an employer has erred in classifying workers, it is better to correct classifications as penalties can be significant and accrue daily!

If you have questions or concerns about the classification of workers, please contact Farallon Law Group's employment law team: Ceide Zapparoni and Michelle Reed.

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