



SOLUTIONS LAW PRESS

HR & BENEFITS UPDATE

Employers Urged To Review & Strengthen Defensibility of Existing Worker Classification Practices In Light of Rising Congressional & Regulatory Scrutiny

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Employers using independent contractors, leased employees or other non-employee workers should carefully review the defensibility of their existing classification and treatment of those workers under tax, labor, employment, employee benefit and other laws in light of stepped up interest and scrutiny by Congress and regulators.

On June 17, 2010, the Senate Committee on Health, Education, Labor, and Pensions held [hearings](#) on pending legislation intended to prevent employers from misclassifying workers as independent contractors to avoid paying minimum wage or overtime or other legal protections due employees under the Fair Labor Standards Act (FLSA).

The Employee Misclassification Prevention Act S.3254/H.R.5107 seeks to reduce misclassification errors by amending the Fair Labor Standards Act:

- Requiring employers to keep accurate records of each workers' status;
- Clarifying it's a violation of the Fair Labor FLSA to misclassify workers;
- Increasing fines for misclassification under the FLSA;
- Requiring employers to notify workers if the employer classifies them as an employee or independent contractor;
- Creating an "employee's rights website" containing relevant information concerning state and federal wage and hour issues; and
- Protecting workers against discrimination or retaliation for requesting proper classification will be protected.

In addition to proposed changes to the FLSA, Congress also is looking at legislation that would tighten worker classification rules under other laws. For instance, the Taxpayer Responsibility, Accountability and Consistency Act of 2009 H.R.3408/ S.2882 would target perceived worker misclassification employment and income tax withholding and reporting abuses by amending the Internal Revenue Code to:

- Require reporting to the Internal Revenue Service (IRS) of payments of \$600 or more made to corporations;
- Define criteria and rules relating to the treatment of workers as employees or independent contractors; and
- Increase penalties for failure to file correct tax return information or comply with other information reporting requirements.
- Require the Secretary of the Treasury to issue an annual report on worker misclassification.

Other proposed legislation would tighten requirements and oversight of the use of independent contractors and other non-employee workers under OSHA and various other federal laws.

While Congress tightens even tighter requirements, regulators are stepping up their scrutiny of employer practices for classifying workers under existing laws. Under a National Research Program announced last September, the Internal Revenue Service has begun conducting the first of approximately 6,000 payroll tax audits that it plans to complete over a three year period focusing on the appropriateness of employer worker classification and other payroll tax practices.

To guard against these and other growing risks of worker classification, employers should review within the scope of attorney-client privilege the defensibility of their existing worker classification, employee benefit, fringe benefit, employment, wage and hour, and other workforce policies and consult with qualified legal counsel about the

advisability to adjust these practices to mitigate exposures to potential IRS, Labor Department or other penalties associated with worker misclassification.

If you need assistance in conducting a risk assessment of or responding to an IRS, Labor Department or other legal challenges to your organization's existing workforce classification or other labor and employment, employee benefit or compensation practices, please contact the author of this update, attorney Cynthia Marcotte Stamer.

Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization, management attorney and consultant Ms. Stamer is nationally and internationally recognized for more than 23 years of work helping employers; employee benefit plans and their sponsors, administrators, fiduciaries; employee leasing, recruiting, staffing and other professional employment organizations; and others design, administer and defend innovative workforce, compensation, employee benefit and management policies and practices. The Chair of the American Bar Association (ABA) RPTE Employee Benefits & Other Compensation Committee, a Council Representative on the ABA Joint Committee on Employee Benefits, Government Affairs Committee Legislative Chair for the Dallas Human Resources Management Association, past Chair of the ABA Health Law Section Managed Care & Insurance Interest Group, and the editor and publisher of [Solutions Law Press HR & Benefits Update](#) and other Solutions Law Press Publications, Ms. Stamer recently was a featured panelist on the ABA Joint Committee on Employee Benefits Teleconference on "Worker Classification & Alternative Workforce: Employee Plans & Employment Tax Challenges" and has worked, published and spoken extensively on worker classification and other related matters. She also is recognized for her publications, industry leadership, workshops and presentations on these and other human resources concerns and regularly speaks and conducts training on these matters. Her insights on these and other matters appear in the Bureau of National Affairs, Spencer Publications, the Wall Street Journal, the Dallas Business Journal, the Houston Business Journal, and many other national and local publications. You can review other highlights of Ms. Stamer's experience [here](#).

If you need help with human resources or other management, concerns, wish to ask about compliance, risk management or training, or need legal representation on other matters please contact Cynthia Marcotte Stamer [here](#) or (469)767-8872.

Other Resources

If you found this information of interest, you also may be interested in reviewing other recent Solutions Law Press updates including:

- [Key Guidance Issued About New Affordable Care Act Health Plan Requirements; Teleconference Briefing Planned July 9](#)
- [Registration Open For July 9 In "Affordable Care Act & Other Federal Health Plan Guidance Update"](#)
- [HHS, DOL & IRS Rules Define "Grandfathered" Group Health Plans & Health Insurance Coverage under Affordable Care Act](#)
- [Stamer Speaks On "Designing Legally Defensible Wellness Programs That Work Amid Changing Federal Regulations" On June 10 in Dallas](#)
- [New Rule Requires Federal Government Contractors To Post New "Employee Rights Under The National Labor" Poster](#)
- [Stamer Speaks June 9 On "Health Care Reform's Implications For Employers, Health Plans & Employee Benefits Practitioners" In Houston](#)
- [Defined Contribution Plans Investing In Publicly Traded Employer Securities Face New Requirements](#)
- [CBO Raises Estimated Cost of Health Care Reforms As Employers, Health Plans Brace Costs Of Newly Effective & Impending Mandates](#)
- [Join Project COPE: Help Develop Real Tools To Meaningfully Empower Patients & Improve Health Care Access, Affordability & Quality](#)
- [Unemployment, COBRA Premium Subsidy Temporarily Extended As Congress Mulls Passing Longer Relief](#)
- [Agencies Invite Public To Share Input About Insurer Obligation To Report About Health Premium Use Under Health Care Reform Law](#)

If you or someone else you know would like to receive future updates about developments on these and other concerns, please be sure that we have your current contact information – including your preferred e-mail – by creating or updating your profile [here](#) or e-mailing this information [here](#) or registering to receive our Solutions Law Press distributions [here](#). For important information about this communication click [here](#). If you do not wish to receive these updates in the future, send an e-mail with the word "Remove" in the Subject to [here](#).

