LOS ANGELES COUNTY
CONSUMER & BUSINESS AFFAIRS

WAGE ENFORCEMENT PROGRAM

Los Angeles County Department of Consumer and Business Affairs
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HONEST WORK, FAIR PAY

Understanding Misclassification In The Workplace

For Employers

Understanding Misclassification

Misclassification happens when a worker is incorrectly classified as an independent contractor rather than an employee. Misclassification can occur; unintentionally due to adopted industry trends or poor management, but may be able to be corrected. Employers that misclassify purposefully and do not correct the situation often become liable for:

- Non-payment of benefits and payroll taxes (medical insurance, disability, social security, etc.)
- Wage and hour violations (non-payment of breaks, non-payment of overtime, etc.)
- Failure to pay for worker's standard operating expenses

Identifying Misclassification

The classification of a worker as an employee or independent contractor depends upon several factors. These factors include:

- Whether the employer provides or pays for the tools necessary to perform essential job functions
- Whether the employer controls (or has the right to control) elements of the work (schedule, performance, location, etc.)
- Ability to accept or reject assignments/seek work elsewhere
- Process for receiving payment (commission, job basis, etc.)
- Duration of the work relationship

To help determine whether your business is classifying workers correctly, use the State of California Department of Employment Development (EDD) "Employment Determination Guide (DE38)" worksheet. This worksheet provides guidance on whether a worker is an employee or an independent contractor.

To access the worksheet visit http://www.edd.ca.gov/Payroll_Taxes/Independent_Contractor_Reporting.htm

Avoiding Misclassification

Educating yourself and your management team on how to correctly classify new and existing employees can help you avoid significant monetary loss and other penalties. Your business may reduce the risk of misclassifying workers by:

- √ Reviewing workers' activities — Employers should make sure that workers' tasks are aligned with an independent contractor work relationship as well as their independent contractor agreements.
- √ Developing a policy for using 1099 forms appropriately.
- √ Evaluating worker independence (Allowing independent contractors to set their own schedules, seek other work, etc.).

Handling Misclassification

If misclassification is affecting your business, it is important you take this matter very seriously. Each case is different. It is in your best interest to resolve the situation before legal action is taken against you. Penalties can include; fines, payment of back wages and/or civil and criminal charges.

Example of penalties:

- Based on a review of claims filed with the California Division of Labor Standards (DSLE), it is estimated that port trucking companies in California are annually liable for up to $998 million each year in wage and hour violations.[1]

You may consult with an attorney if you have any questions about your workers or if you suspect misclassification is taking place. Businesses may deal with a claim by:

- Contacting the Los Angeles County Bar Association lawyer referral service at (213) 243-1525 for a free 30-minute consultation.
- Asking your attorney about amnesty programs — such as Assembly Bill 621 (Drayage Truck Operators: Motor Carrier Employer Amnesty Program), which focuses on helping the port trucking industry — to help you cooperate with workers and lessen possible penalties.

1: Smith, Rebecca. "The Big Rig Overhaul." *The National Employment Law Project*. Feb. 2014. Pg 4. Web.

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