


Mountain States Employers
Council

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Overview of Today's
Discussion

- ▼ Background
- ▼ Employee Classifications
 - ▶ Exempt vs. Nonexempt
- ▼ Employee vs. Independent Contractor
- ▼ Volunteer Status and Requirements
- ▼ Lilly Ledbetter Fair Pay Act 2009



Headline News

- ▼ If you feel a chill every time you do payroll these days, it's probably because of news headlines like these:
 - ▶ Starbucks Settles DOL Overtime Suit for \$18 Million
 - ▶ Or
 - ▶ Farmers Insurance to Pay \$90 million in Back Wages.



2008 GAO Report

- GAO found frequent instances where WHD:
- ▶ Inappropriately rejected complaints based on incorrect information provided by the employer
 - ▶ Failed to make adequate attempts to locate employers
 - ▶ Did not thoroughly investigate and resolve complaints
 - ▶ Delayed initiating investigations for excessive periods of time



"DOL Not Fulfilling Mission"

- ▼ "An Obama DOL will fight to protect overtime rights for millions of Americans and enforce wage and hour laws"





Department of Labor Enforcement

▼ 2009

- ▶ First six months, DOL has collected a total of \$82 million in back wages for 107,000 minimum wage workers.
- ▶ DOL hiring an additional 250 field investigators in the Wage and Hour Division.



Enforcement and Remedies

▼ On-site Investigation

- ▶ Review payrolls and time records
- ▶ Interview employees privately
- ▶ Meet employer to review the investigative findings
- ▶ Compute the back wages for both current and former employees



Enforcement and Remedies

▼ Penalties

- ▶ Back Pay liability – two years, or three years if a violation is willful
- ▶ Civil money penalties
- ▶ If private lawsuit, employee can collect attorney fees

▼ Class Action

▼ Retaliation



Employee vs. Independent Contractor

- ▼ Independent Contractor
 - ▶ General rule is that a person is an independent contractor if the company utilizing the services of the worker has the right to control or direct only the result of the work and NOT the means or method of accomplishing that result.



IRS Factors for Independent Contractors

- ▼ Behavioral Control
- ▼ Financial Control
- ▼ Type of Relationship between worker and business.



Behavioral Control

- ▼ Does the company have the right to direct and control how the worker does the task?
 - ▶ Instructions the business gives the worker.
 - ▶ Training the business gives to the worker.



Financial Control

- ▼ Whether the business has the right to control the business aspects of the worker's job.
 - ▶ Extent to which worker is not reimbursed for business expenses.
 - ▶ Extent of worker's investment.
 - ▶ Ability of worker to make his services available to the relevant market.
 - ▶ How the business pays the worker.
 - ▶ Extent worker can realize a profit.



Relationship Between Worker and Business

- ▼ Written contracts between business and worker describing relationship.
- ▼ Does the business provide worker with employee type benefits.
 - ▶ Insurance, pension plan, vacation pay, sick.
- ▼ Permanency of relationship.
- ▼ Extent services performed by worker are key to the employer's regular business.



State Tests

- ▼ Whether individual has been and will continue to be free from control or direction over the performance of services.
- ▼ Is the service outside the usual course of the business or service is outside the places of business for which the service is performed.
- ▼ Whether the individual is engaged in an independently established trade, occupation, profession or business.



New Colorado Law

- ▼ June 2, 2009, Governor Ritter signed into law H.B. 1310.
- ▼ Bill provides individuals with a direct way to assert that an employer has misclassified them as independent contractors instead of employees.
- ▼ Fines
 - ▶ First offense: \$5,000
 - ▶ Subsequent violations: Up to \$25,000 and potential to lose right to contract with state for up to two years.



Employee vs. Independent Contractor

- ▼ Recommendations
 - ▶ “Self audit” your company records.
 - ▶ Independent contractor agreements for each independent contractor.
 - ▶ Keep well-documented files on independent contractors.
 - ▶ Monitor federal and state court decisions and rulings that relate to independent contractors.



Exemptions From Overtime

- ▼ Executive, Administrative, Professional.
 - ▶ Employee is paid a salary, rather than an hourly basis; and
 - ▶ Employee performs certain exempt duties.
