

Consequences of Misclassification of an Independent Contractor Who Should Have Been Classified an Employee

1. Liability for unpaid wages, including possible overtime pay, for a period of up to three years. Payments made to independent contractors rarely, if ever, comport with the timing and recordkeeping requirements of California Labor Code. If employee status is found, the failure to pay all wages which are due every pay period may result in the imposition of penalties of \$50 or \$100 per employee per pay period and up to 25% of the wages not paid to each employee each pay period. (CA Labor Code § 210) Employers who make lump-sum payments to individuals improperly classified as independent contractors may violate the statutory obligation to provide itemized wage statements to employees each pay period or may violate the statutory obligations to keep such records, and become subject to additional civil penalties in the amount of \$250 per employee for the first citation and \$1,000 per employee for each subsequent citation. (CA Labor Code § 226.3) A knowing and intentional violation of these requirements is a misdemeanor. (CA Labor Code §226.6) In addition, the failure to pay a terminated employee all wages due and owing in a timely fashion can subject an employer to a penalty of up to 30 times the employee's daily wage without regard to the actual amounts of unpaid wages. (CA Labor Code 203)

2. If individuals classified as independent contractors are found to be employees, the employer will be assessed amounts due for unemployment insurance contributions, training taxes, and disability insurance contributions. State income tax withholding amounts will also be assessed, unless an employer can show the income was reported and all taxes due were paid by the employee. Employers who fail to pay contributions for unemployment or state disability insurance benefits without good cause are liable for a penalty of ten percent of the amount of the contributions and for interest on any unpaid contributions. (CA Unemployment Insurance Code §§1112, 1113)

3. Labor Code § 3602 provides that workers' compensation is the exclusive remedy available for injuries sustained by employees in the course and scope of their employment. Thus, an injured employee is precluded from bringing a personal injury suit against an employer for damages sustained as a result of such injuries. If, however, an individual has been misclassified as an independent contractor and the employer has not provided workers' compensation coverage for the individual, the employer can be held liable for civil tort liability not only to the individual, but also to third parties who are injured as a result of negligent acts engaged in by the misclassified individual in the course and scope of employment. (CA Labor Code § 3706) Further, employers who receive contributions from employees to cover any part of the cost of workers' compensation coverage could be found guilty of a misdemeanor.

Employers who fail to secure workers' compensation insurance for their employees are subject to both workers' compensation claims and civil tort actions

by injured employees. In addition, employers can be held liable for a separate penalty of up to \$100,000 payable to the state. Further, an employer may be held liable to the employee for an additional penalty of ten percent of any workers' compensation benefits recoverable by the injured employee. (CA Labor Code § 4554) Attorney's fees may also be assessed against the employer in addition to any compensation benefits paid. (CA Labor Code § 4555)

Pursuant to CA Labor Code § 4150, an employer may provide workers' compensation coverage to individuals not included in the definition of employee if both parties elect to do so. While such an election would serve to protect an employer from liability for civil tort suits from injured misclassified independent contractors, it may also serve as an indication of employment status in other contexts.

4. Employers who misclassify employees as independent contractors are liable for the state income tax amounts not withheld unless the employer can show that the contractor appropriately reported income and paid state income taxes due. The showing required usually involves the filing of a form prepared by the employer and signed by the employee attesting that income received was reported and taxes were paid. Failure to make appropriate withholdings for state income tax payments from employee paychecks is a misdemeanor and an employer, if convicted, may be fined up to \$1,000 and/or sentenced to serve up to one year in prison. (CA Unemployment Insurance Code § 2118)
5. Employers who misclassify employees as independent contractors may be assessed 1.5 percent of the employee's federal income tax liability and 20 percent of the amount that should have been withheld for the employee's FICA taxes.