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FOR, BY AND ABOUT LONG ISLAND LAWYERS

EMPLOYMENT LAW

Municipalities must place focus on payroll classifications



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On March 7, The Office of the State Comptroller released a letter to five Long Island school districts, each of which had classified their legal counsel as a district employee. The OSC concluded that the districts had incorrectly classified the attorney as an employee and recommended the submission of corrected Employee Retirement System reports and the initiation of a corrective action plan.

The FBI, the Internal Revenue Service, the New York Attorney General's office and the State Education Department have also indicated that they are investigating erroneous classifications. In light of this scrutiny, all municipalities must carefully review their payrolls to ensure that all employees are properly classified as employees and not independent contractors, and vice-versa. In undertaking this examination, a municipality should consider, among other things, the following criteria, no one or two of which is dispositive of the analysis:

How much control does the employer have over the worker? If the employer directs the time, place and manner in which the work is to be performed, that is evidence of an employee relationship.

Also, how much independence does the individual have in performing the work? If the individual does not receive explicit instructions from the employer as to how to perform the services and can work when and where he/she chooses, that is evidence of an independent contractor relationship.

To aid in the determination of whether an employer has sufficient control over an individual to be an employee, the IRS has set forth 20 factors or elements to use to determine whether sufficient control is present to establish an employer-employee relationship. The factors are:

- Instructions about when, where and how the individual is to work**
- Training**
- Integration**
- Services rendered personally**
- Hiring, supervising and paying assistants**
- Continuing relationship**
- Set hours of work**
- Full time required**
- Doing work on employer's premises**
- Order or sequence set**
- Oral or written reports**
- Payment by hour, week, month**
- Payment of business and/or traveling expenses**

Furnishing of tools and materials

Significant investment

Realization of profit or loss

Working for more than one firm at a time

Making services available to general public

Right to discharge

Right to terminate

In recent years the IRS has been taking a more global approach, which looks at three categories of evidence. This new approach incorporates many of the factors from the 20-factor test, however it focuses on three main categories: (1) behavioral control, (2) financial control and (3) relationship of the parties.

For the first category, behavioral control, a court will look at whether the employer has the right to direct and control the work. Extensive instructions on how, when or where the work is to be done, what tools or equipment to use, what assistants to hire to help with the work, and where to purchase supplies and services suggest a worker is an employee. Also, if an employer provides training about required procedures and methods, this indicates that the business wants work done a certain way and therefore suggests that the worker is an employee.

The category of financial control looks at the facts that show investment in the worker's work, expenses and opportunity for profit or loss. Facts that show a worker has significant investment in their work, is not reimbursed for business expenses and can realize a profit or incur a loss suggest that a worker is an independent contractor.

The third category, relationship of the parties, looks at employee benefits and written contracts. If a worker receives employee benefits such as insurance, pensions and paid leave, this indicates that the worker may be an employee. However if the worker does not receive benefits, he or she can be considered an employee or an independent contractor. Also considered is the intent of the parties, which can be found in a written contract. This would be significant especially in a situation where it is difficult to determine the worker's status based on other facts.

In light of the recent governmental and media attention given to worker classification, particularly with respect to professionals, all municipalities should carefully review their payrolls and, utilizing the above criteria, determine the proper classification of all workers.

If a municipality becomes the target of an investigation by any federal, state or local authority with regard to payroll-related issues, it should carefully review its insurance policies in order to insure that any applicable notification requirements are met on a timely basis.

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