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New Colorado Law Imposes Harsh Penalties for Misclassifying Employees as Contractors

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The stakes just got higher for businesses that misclassify employees as independent contractors. According to HB1310, which went into effect in Colorado on June 2, a business may now be fined up to \$5,000 *per misclassified employee* for the first willful violation. For subsequent willful violations, a business may be fined up to \$25,000 *per misclassification* and prohibited from contracting with the state for up to two years. In addition to these new penalties, businesses may also be held responsible for potential fines, penalties and liability associated with failure to pay appropriate payroll taxes, minimum wage or overtime, and benefits. If a large number of individuals were misclassified, the penalties can add up quickly.

To avoid these risks, businesses should carefully consider whether those individuals they have retained, or might retain, as contractors should instead be classified as employees. Just because someone is working part-time or on a limited basis, or asks to be paid as a consultant, does not mean he is an independent contractor. Instead, a variety of state and federal agencies, and the courts, rely on numerous factors to make the determination on a case-by-case basis. A person is likely an employee—as opposed to an independent contractor—if she is required to: comply with detailed instructions, work set hours or a specific schedule, provide regular reports to a supervisor, work exclusively for your organization, do the work herself, attend training sessions for employees, and use a business card identifying herself as an employee.

On the other hand, a true independent contractor typically owns or works for a separate business, provides the same or similar services to others, has the potential for profit or loss from the engagement, can contract out the work to others, is subject to a written agreement identifying the individual as a contractor, and works independently, without supervision or direction.

If you have questions about the proper classification, the new law allows businesses to seek "advisory" opinions from the Division of Employment and Training. But beware: if there is a complaint down the road, failure to heed the advice in such opinions will almost certainly be used against your company to suggest the misclassification was willful.

Given the risks and substantial penalties imposed by Colorado's new law, think twice before deciding to classify someone as a consultant or contractor. There might not always be a clear right or wrong answer, but at

a minimum you should consider all the pertinent factors and determine whether you have a good faith basis for hiring someone a contractor instead of an employee.

If you have questions about HB 1310 or independent contractor issues generally, please contact Mark Wiletsky at (303) 473-2864 or mbwiletsky@hollandhart.com.

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