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Liability lurks in various trades

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What do exotic dancers and drywall laborers have in common? Both have traditionally been treated as independent contractors in their respective industries. However, their classifications have recently been subjected to legal challenge.

We have frequently reported on the focus of plaintiffs' lawyers and state and federal tax authorities and agencies on enforcing employee classification laws. One example is Joseph Godwin's "Words on Wise Management" column on page 3 of our March 2013 issue, which concisely explained the incentives employers have to misclassify employees and why regulators and plaintiffs' lawyers seek out and remedy violations. Two recent cases from the federal court covering Arizona offer instructive examples of misclassification issues and the litigation and public relations risks presented by enforcement actions.

Cabaret clubbed with claims

Allyson Kesley was an exotic dancer at Christie's Cabaret in Phoenix. On May 23, 2014, she filed a class action lawsuit against six corporate entities and Steve C. Cooper, who allegedly operates Christie's locations in Phoenix, Tempe, and Glendale. The chain also has locations in Greensboro, North Carolina, and Brunswick, Canton, and Cleveland, Ohio.

Kesley seeks to throw the wage and hour book at Christie's. She alleges that she and other exotic dancers at the company's seven cabarets were improperly classified as independent contractors when they were really employees. She claims that dancers were paid from tips from club patrons and that management skimmed an improper amount off the top and divided the tips among employees who do not customarily receive tips (e.g., the "house mom," disc jockeys, and bouncers).

Kesley asserts that Christie's failed to keep adequate records of hours worked and compensation paid and coerced dancers into working as independent contractors by fraudulent means, including by failing to post required U.S. Department of Labor (DOL) posters. Because of the alleged fraud, she wants to throw out the statute of limitations on all her claims and recover back pay and damages from the time Christie's implemented the pay practices. Damages could include unpaid minimum wages, unpaid overtime wages, and misappropriated tips multiplied by two under the Fair Labor Standards Act's (FLSA) liquidated damages provision.

For the exotic dancers who worked at Christie's Arizona locations, Kesley is seeking three times the unpaid wages under the Arizona Wage Payment Act. The Arizona dancers will automatically be part of the class unless they opt out, while dancers from other states will have to opt in if Kesley's lawsuit succeeds. This case is just getting started, but it's certainly bad news for the adult entertainment business.

DOL fines and lauds

On May 19, 2014, the DOL filed a lawsuit against Paul Johnson Drywall, Inc., in federal court in Phoenix. The same day, the parties filed a consent judgment resolving the case. The consent judgment was entered on June 2.

According to the DOL, the drywall contractor and its owner failed to properly pay overtime and keep complete and accurate records as required by the FLSA for employees paid on a piece-rate basis, which is customary in the drywall industry. Piece-rate wages are fine under the FLSA, but if a worker logs more than 40 hours in a workweek, he is due

overtime at 1½ times the "regular rate." The regular rate is calculated by dividing the employee's total compensation by the total hours he worked that week. In April 2013, the drywall company put that complicated pay calculation behind it and contracted with Arizona Tract LLC, which hired the company's former workers as "members/owners."

Under the terms of the settlement, the drywall company will pay $556,000 in overtime, back pay, and liquidated damages to at least 445 current and former employees and a civil penalty of $44,000. It also will sever its business relationship with Arizona Tract, reclassify 1,325 workers as employees, and hire 627 new employees. Thanks to the arrangement with Arizona Tract, the company's workforce was down to 28 employees.

On the day of the court filings, the company issued a press release announcing it was "implement[ing] a worker classification initiative developed through [DOL] collaboration." The next day, a DOL press release lauded the industry leader for taking "such a public stand against the scourge of misclassification." The DOL cited the company's commitment to hire a third-party compliance monitor, conduct regular training of its workforce, and present educational campaigns to builders' associations as key features of the settlement. The DOL also complimented the company for its commitment to ensure that its subcontractors are properly licensed and insured and comply with the FLSA. Shout out to Paul Johnson Drywall for making the best of a bad situation.

Bottom line

Employee misclassification may be tempting, but as these two cases demonstrate, the huge risks substantially outweigh the short-term tax and payroll benefits. When there is doubt about whether a particular individual should be classified as an employee or independent contractor, savvy employers seek the advice of an attorney experienced in wage-hour matters.

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