

High Tech Counsel Corner

Many businesses use independent contractors as an alternative to traditional employees. Independent contractors can provide specialized skills, more flexibility, and lower costs in some circumstances. There has always been a tension, however, as to when it is appropriate to characterize a worker as an independent contractor rather than an employee. Improper classification may have serious consequences under federal and state laws.

A new law in New Hampshire changes the definition of an employee and the criteria for qualifying as an independent contractor. This law will go into effect on January 1, 2008. The new definition affects New Hampshire laws regarding the payment of wages, minimum wages, workers' compensation, and whistleblower protection, among others. The policy considerations behind the new law include protecting employees from being improperly classified as independent contractors and thereby denied workers' compensation coverage and other employee benefits.

With the enactment of the new law, twelve criteria must now be satisfied in order for a worker to be considered to be an independent contractor in New Hampshire. Previously, only five criteria were required to satisfy the independent contractor classification.

Some of the new criteria include whether the person is responsible for satisfactory completion of the work, has continuing or recurring business obligations, is responsible for expenses related to the work or service performed and receives compensation for the work or services performed that is not determined unilaterally by the hiring party. Under the new law, all twelve criteria must now be met for a person to be classified as an independent contractor.

It is critical for employers to correctly classify individuals providing services as employees or independent contractors in light of these new changes. Failure to do so could subject the employer to payment of back employment taxes, workers' compensation, and other employment benefits, in addition to substantial penalties.

The new law requires employers to post in a conspicuous place a notice that includes the revised criteria. The NH Department of Labor anticipates a new poster for this purpose being available in December.

Employers should review the status of persons who are being treated as independent contractors to ensure that they pass muster under the new criteria, and consult a knowledgeable attorney regarding any questions about those criteria or how they should be applied to particular circumstances.



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