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Rise in Misclassification Suits and DOL Audits Quite a Fright: What an Employer can do to Prepare

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Few things are more frightening to an employer than a worker misclassification suit. Perhaps a Department of Labor audit over wage and hour issues may be just as scary. One thing is for sure: disagreements about how workers are classified, i.e., which workers are exempt from overtime pay and certain wage and hour laws, have been on the rise and employers are having to pay out hefty sums to settle these cases.

In the last two years, wage and hour class action lawsuits filed in state and federal courts have increased by 11%. Moreover, wage and hour class actions (2,507) were filed 18 times more often than discrimination class actions (139) in federal courts in 2012.

Aside from the frequency of these types of lawsuits, the amount of money that employers have had to pay to rid themselves of these actions is no small expenditure. A study cited in the October 2013 U.S. Chamber Institute for Legal Reform showed that, in 2012, settlements of wage and hour cases reached $467 million. For the time period between 2007 to 2012, that amount was $2.7 billion.

How can an employer prepare for this scary trend? A strong evidentiary trail. The following are types of documents that are helpful to an employer defending against a misclassification claim:

- Up-to-date job descriptions:
  - A best practice would be to have an employee acknowledge his or her job description by signature - this provides pretty powerful evidence of affirmation by an employee of his understanding of his job duties
- Employee performance reviews
  - Again, where an employee puts, in his own words, his understanding of his own job descriptions, it can prove to be strong evidence in a later misclassification suit
- Employee self-assessments

Other ways to prepare for misclassification claims and/or audits by the DOL are continual monitoring of litigation trends in the relative industries and completion of the employer's own audit to ensure compliance.

Additionally, in light of recent Supreme Court cases which have upheld arbitration clauses with class waivers, employers can have their employees sign arbitration agreements that relinquish their rights to bring a collective action. However, employers should still be wary of creating arbitration agreements that are too “one-sided”, which essentially dissuade employees from bringing claims, as a recent Ninth Circuit decision refused to enforce such an arbitration agreement in a proposed wage and hour class action. Nonetheless, valid arbitration agreements can be a useful tool for employers to control the amount and frequency of wage and hour class actions in the future.