

Changes in Employment Laws and Enforcement Present New Compliance Challenges

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By Nancy A. Emerson and Rania V. Sedhom

Human Resources departments have faced more changes in employment law this year than they have in decades. New laws, such as the Lilly Ledbetter Fair Pay Act of 2009 (Ledbetter Act), revised employment eligibility documentation standards and procedures. While adjusting to a changing legal landscape, HR needs to manage other ongoing compliance responsibilities, such as ensuring that independent contractors are not employees under the IRS's multi-pronged test. To avoid liability for misclassifying workers as independent contractors, employers will also need to meet any applicable state requirements for determining whether workers are properly classified. Sometimes, the state test may be more rigorous than its federal counterpart.

Complying with all these legal changes, while juggling other demands, may require a proactive approach.

This *InsightOut*:

- Summarizes the implications of the Ledbetter Act, the changing requirements for verifying employment eligibility through the I-9 process, and the determination of independent contractor status;
- Identifies the risks associated with non-compliance; and
- Recommends actions employers should take to mitigate risks in these areas, to position themselves to pass government audits, and to defend themselves against potential employee claims.

LILLY LEDBETTER FAIR PAY ACT

On January 29, 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act, which applies retroactively to May 28, 2007. On February 5, Buck published an FYI that discusses the Ledbetter Act in detail, [Obama Signs Lilly Ledbetter Fair Pay Act](#). For that reason, we will not reiterate the main points of the Act. Rather, we will remind readers that, under the Ledbetter Act, an employee may make a claim of an unlawful pay practice when:

- A discriminatory compensation decision or other practice is adopted;

- An individual becomes subject to a discriminatory compensation decision or practice; or
- An individual is affected by a discriminatory compensation decision or practice, including each time wages, benefits, or other compensation affected by that decision or practice are paid ("the paycheck rule").

Risks: If an employee prevails in a pay discrimination claim, an employer could be liable for up to two years of back pay, and any benefit, retirement (accruals and benefits), 401(k) (contributions and employer match), incentive or bonus payments, that are based on a pay decision. The Equal Employment Opportunity Commission (EEOC) is hiring more investigators, so employers can expect to face increased scrutiny of discrimination claims, including pay-equity claims.

What Should Your Organization Do?

As organizations assess the implications of the Ledbetter Act, they may want to take a closer look at their pay practices. As part of this closer look, your organization may want to undertake audits of various processes underlying compensation decisions that may give rise to employees' claims.

Your organization should consider auditing these processes to:

- Discover potential risk factors and take steps to address problem areas, if any;

- Confirm that you are paying employees fairly;
- Position the company to reduce risks of penalties if subject to a government audit, minimize exposure to pay-equity claims, and limit potential back-pay liability should such claims succeed.

Also consider initiating the following internal risk assessments:

- Review compensation and performance management policies and performance reviews to determine whether those policies are reasonable and applied consistently. Determine whether application of those policies causes a disparate impact upon certain employees.
- Audit pay programs to test for disparity in compensation by gender, age, race, religion, disability status, and national origin.
- Examine the exempt/non-exempt status of all employees.

Take the time to train and retrain managers in writing objective performance reviews which correspond with assigned ratings, and clearly document the reasons for recommending salary actions, promotions, performance improvement plans or other actions. Finally, ask yourself whether your organization has a process by which employees can appeal grade assignments, promotions, or other actions that affect salary. An open-door, open-communications approach to compensation can encourage employees to raise and resolve pay issues with management or Human Resources before filing a claim.

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I-9 REGULATORY CHANGES

There are significant changes to the I-9 requirements and how organizations submit the information to the U.S. Citizenship and Immigration Services.

Risks: If your organization knowingly ignores the law, it can face civil fines and criminal prosecution. Some of the risks associated with I-9s are those concerning data breaches and adequate procedures to ensure compliance with the re-verification requirements.

Your organization should be concerned about these changes because:

- The new requirements entail revised administrative processes for HR.
- Failure to properly complete, retain and/or make available for inspection Forms I-9 as required by law can subject an employer to a fine of up to \$1,100 for each violation.
- Employment verification documents must be properly stored and, when necessary, destroyed.

Therefore, be certain that you:

- Require all employees in your organization to provide proof of their identity and proof that they are legally entitled to work in the United States.
- Have a process for completing and verifying I-9 forms.
- Have a records management and retention system adequate to track immigration status and to withstand an audit by the Department of Homeland Security.
- Have an appropriate records security system in place.
- Are prepared to implement the revised documentation standards, including re-verification of employment eligibility prior to the expiration of the employee's current authorization to legally work in the country.

To Avoid Penalties and Assess Organizational Risk, Your Organization Should:

- Train those tasked with verification in the new standards of documentation;
- Ensure consistent documentary practices when verifying employment authorization and identity of employees during I-9 process, regardless of national origin or citizenship status;
- Assess your process for maintaining documentation;
- Audit I-9 records to ensure that you have complete and appropriate documentation on file;
- Evaluate moving to the E-Verify system to automate the process; and
- Build a procedure for complying with the re-verification process.

INDEPENDENT CONTRACTOR STATUS

An independent contractor (contractor) is a self-employed worker who is hired to accomplish a given result in a specified or indefinite period of time and who generally has the right to control or direct the details of his or her own work and the means by which the desired results are achieved. Employers often run into worker classification problems when they hire contractors whom they, in effect, treat as employees. Improperly classifying employees as independent contractors exposes employers to potential wage and hour and overtime violations, payroll recordkeeping problems, federal and state tax liabilities. In such situations, employers also run the risk of violating applicable unemployment insurance, ERISA, and worker's compensation laws.

Risks: If the IRS determines that an employer-employee relationship exists and a worker was misclassified as a contractor, employers can be held criminally or civilly liable, and they may be required to compensate those who were misclassified as contractors. This compensation could include paying the value of employer taxes, benefits, vacation, bonuses, equity compensation, overtime, and other employee perquisites.

Often overlooked in cases of misclassified workers are the fees and penalties attendant with sole proprietor benefit plans that the contractor may have erroneously held. For example, who — the organization or the individual — is responsible for the fees and penalties associated with the one-person 401(k) or SEP-IRA started by the contractor who should have been classified as an employee?

Organizations sometimes walk a fine line in classifying workers as contractors. Companies may misclassify employees as contractors in order to minimize benefit costs, to keep full-time headcount at certain levels, or simply by mistake. The multi-factored IRS definition of independent contractor leaves much to interpretation. Enforcement agencies, however, are scrutinizing these arrangements with greater precision and imposing tougher penalties, regardless of the employer's knowledge or intent.

If you can answer "yes" to any of these questions, you will want to investigate this issue further:

- Do you give your contractors business cards?
- Is the contractor's work performed under direct supervision with detailed instructions?
- Is the length of the contractor's assignment indefinite?
- Do you reimburse contractors for all expenditures?
- Do you have any contractors supervising full-time employees of the company?
- Is the decision to hire contractors decentralized so that HR does not have oversight over work arrangements and length of assignments?

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What Should Your Organization Do?

The criteria in some states, such as Massachusetts, for determining employee rather than contractor status are more stringent than the IRS definition. To avoid paying Federal or any state penalties, your organization should:

- Clearly articulate, document, and communicate the definition of a contractor.
- Perform an employee classification assessment to determine if you have any potential issues.
- Review current contractor relationships, including any written agreements.
- Provide standard Independent Contractor agreements.

CONCLUSION

Recent legislative changes and enforcement initiatives should strongly encourage Human Resources departments to evaluate what actions they should take to effectively mitigate the risks discussed here. Although tracking possible compensation discrepancies, complying with revised I-9 standards, and monitoring contractor status increases HR's workload, the risk of doing nothing and incurring financial penalties is considerable.

Take the time to do a thorough review of existing documentation and related policy and procedures. In addition to complying with the Ledbetter Act, immigration regulations, and contractor criteria, the HR department needs to be prepared to implement proper sharing, storage, and destruction of the data collected in response to these new regulations.

About the Authors:

Nancy A. Emerson, a Boston-based Director in Buck's Human Capital Management consulting practice, has more than 10 years of consulting experience. She specializes in program management, strategic planning, process improvement, and organizational redesign. Nancy has assisted companies in several industries transform their business by creating more effective and efficient process improvements, making changes to the organizations' service delivery models, and supporting these changes with the appropriate training and change management activities. She can be reached at 617.275.8029 or at nancy.emerson@buckconsultants.com

Rania V. Sedhom, a New York-based Principal and attorney in Buck's Tax and Legal Consulting group, advises companies on workplace policies such as sexual harassment and discrimination, employment, data privacy, promotion, demotion, and termination issues. Rania has written several chapters in the Privacy & Data Security Law Journal and is a member of its Board of Editors. She also is a member of the Luxury Marketing Council. Because of her fluency in Spanish, French, and Arabic in addition to English, she has helped companies marry various cultures to achieve workplace harmony. Rania can be reached at 212.330.1208 or at rania.sedhom@buckconsultants.com