New York State Labor Department Targets Health Care Pay Practice

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Medical practices are reeling from fines and penalties resulting from New York State Labor Department audits. In September, 2007, an interagency strike force was formed in New York to address employers who inappropriately classify employees as independent contractors or pay workers off the books. Health care employers are singularly exposed, because of the conundrum of exercising control over workers to ensure compliance with legal and regulatory requirements while maintaining the independence of those workers as independent contractors.

Labor department audits can also result from a fired worker seeking unemployment benefits or an injured worker seeking worker's compensation. These workers often advocated that the employer treat them as independent contractors, until they were injured or unemployed and then changed their tune to claim that they were, instead, employees.

Regardless of the reason for the audit, the consequences can be devastating. This is because improperly classifying an employee as an independent contractor exposes the business to liability not only for unpaid unemployment contributions, but also for worker's compensation and FICA and FUTA contributions, as well as fines and penalties. One employer, for example, was facing over a million dollars of penalties claimed by the IRS, as a result of the New York State Labor Department determining that fewer than seven sales representatives were employees, not contractors.

More limited exposure exists when employers label employees as "salaried" despite their job duties and earnings. Only employees who perform administrative, executive or professional duties (and other limited exceptions) are exempt from overtime and minimum wage requirements, and in order to be exempt, most employees must be paid on a salaried basis and meet income requirements imposed by both New York State and the federal government.

The New York State Labor Department can collect back wages and taxes for six years, unlike the Federal government, which collects for a shorter period of time.

Health care businesses can and should do something about this exposure. Here are some suggestions:

Audit the work force to determine if you have properly classified workers as independent contractors. If you exercise control over how the worker performs the job, it is likely that the worker will be deemed to be an employee, not an independent contractor.

Make sure that your documentation supports that you are treating the worker as an independent contractor and that the tests to be classified as a contractor are met. Draft a contract. Review what materials and equipment are provided to the contractor. Make sure that you do not restrict the contractor from working for other businesses.

Perform the same tests on an employee you believe to be exempt from the overtime and minimum wage laws. Review the employee's actual duties, whether the employee is being paid on a salaried basis, and whether the employee has been paid the necessary minimum salary. Make sure that there are no deductions from wages for less than full day absences, unless permitted by law.

These are some of the ways that a business can minimize its exposure to crippling back pay awards, and fines and penalties. The bottom line is that many businesses are either inadvertently or as a cost saving measure, exposing themselves to substantial liability. The lesson is to conduct your own audit before the Labor Department conducts one to make sure that your procedures and documents are in order.

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