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MSPA-NA
State Legislative Update

The following are state legislative updates that we thought would be of interest to MSPA-NA members. If you have any questions concerning these updates, please let us know.

I. Connecticut

Connecticut H.B. 5318 Would Require Business Owners to Prepare and Submit 1099s to the IRS

On January 13, 2015, State Representative Jonathan Steinberg (D) introduced H.B. 5318 to reduce fraud and increase tax revenue. The bill would require business owners, instead of the independent contractor, to "report the amount of wages paid to [] independent contractors by preparing and submitting Internal Revenue Service Form 1099 to the Internal Revenue Service."

II. Hawaii

Hawaii S.B. 1219 and H.B. 1213 Would Certify Self-Employed Workers as Independent Contractors

On January 27, 2015, State Senator Rosalyn Baker (D) introduced S.B. 1219 to provide a mechanism that enables individuals or businesses wishing to contract with self-employed individuals to confirm that an individual is a bona-fine independent contractor. On January 28, 2015, State Representative Joseph Souki (D) introduced, H.B. 1213, a similar measure in the House.

The bills would amend the Employment Security Statute (HRS § 383-6) by defining "independent contractor" to mean:

> (a) An individual performing services under any contract of hire shall be deemed to be an independent contractor if the individual meets the requirements for independent contractor status pursuant to rules adopted by the department under chapter 91.
>
> (b) Notwithstanding subsection (a), an individual shall *be presumed* by the department to be an independent contractor if the individual has:
>
> > (1) A valid employee identification number issued by the United States Internal Revenue Service;

(2) Registered with the department of commerce and consumer affairs to do business;

(3) A current general excise tax license issued by the department of taxation; and

(4) Entered into a written agreement with a customer to perform services for which the individual has registered to do business.

Additionally, the bills would provide that an individual who satisfies the foregoing requirements for independent contractor status, *shall* be certified as an independent contractor. Certified independent contractors can prove their legitimacy by presenting potential clients with their certification. However, a certified independent contractor would be prohibited from filing a claim for unemployment insurance benefits against a client, unless the independent contractor could prove that an employer-employee relationship exits.

III. Iowa

Iowa Representatives Introduce Bill to Increase Penalties for Willful Misclassification

Seventeen Democrat state representatives led by Bruce Hunter, introduced H.B. 72 on January 21, 2015, which would increase the penalties for employers who willfully misclassify employees for unemployment compensation purposes.

Currently, employers found to have willfully failed to pay an unemployment compensation contribution, for any reason, with the intent to defraud the department of workforce development, shall pay the required contribution and an additional penalty equal to fifty percent of the amount of such required contribution.

H.B. 72 would amend the Unemployment Compensation law (Iowa Code § 96.14(2)(e)) by adding a section doubling the additional penalty to one hundred percent of the amount the employer failed to pay, when such failure to pay also involved the *misclassification* of an employee's wages on a Form 1099.

IV. Mississippi

H.B. 4 Would Subject Sales by Mississippi Independent Contractors to Sales Tax

In an effort to expand its income tax base, on January 6, 2015, State Representative Cecil Brown (D) introduced H.B. 4 which would subject income derived from nonresident activity conducted in Mississippi by independent contractors to sales tax.

The bill would amend the income tax provisions of the Mississippi Code (Code § 27-7-23) by expanding the definition of "doing business" in Mississippi by a nonresident to include:

(D) The regular rendering of service to clients or customers in Mississippi in person or by agents, employees or *independent contractors conducting business in Mississippi*; or

(E) The regular solicitation of business from potential customers in Mississippi.

V. Missouri

H.B. 461 Would Recognize a Taxpayer's Section 530 Status for Purposes of Missouri Employment Taxes

On January 12, 2015, State Representative Bahr (R) introduced H.B. 461, which would establish the Employee Reclassification Act and would recognize a taxpayer's Section 530 status for purposes of Missouri employment taxes. Representative Bahr also introduced H.B. 460 on January 12, 2015, which would separately recognize a taxpayer's Section 530 status for purposes of Missouri employment taxes. Both bills would go into effect on August 28, 2015.

H.B. 461 would amend Missouri's labor laws, Chapter 285, RSMo, by adding two new sections. First, the Employee Reclassification Act would add a new section known as 285.080 providing in relevant part:

- The Department [of Labor and Industrial Relations] shall promulgate a rule providing a clear and concise definition of what is an independent contractor and procedures by which the Department may change an individual's classification . . . .

- [I]t shall be presumed, absent conclusive evidence to the contrary, that funds paid to:

  (1) a limited liability company, corporation, or entity formed under the applicable assumed name certificate statute organized under chapter 347 or other applicable state statute;

  (2) an individual licensed by the state or appropriate local authority, that provides services to multiple customers and whose services are not the same as the services provided by a customer; or

  (3) a licensed attorney . . .

  are funds paid to an independent contractor and not an employee.

- An individual or employer may request an opinion letter from the Department whether a particular individual should be classified as an employee or an independent contractor. If the employer classifies an individual as an independent contractor based upon the recommendation in the opinion letter, the Department shall not impose a fine or additional employment taxes if it subsequently determines the individual is an employee.

- If the Department conducts an audit and concludes that an individual classified as an independent contractor should be reclassified . . . the employer shall be given a period of sixty days to comply . . . and . . . shall not be liable for any assessment of employee tax, interest, or fines for the misclassification.

- If the Department's finding is appealed, the fine and the assessment for interest . . . shall be tolled while the finding of the Department is appealed . . . .

Second, the bill would add a new section known as 285.517 which would recognize a taxpayer's Section 530 status for purposes of Missouri employment taxes:

> Notwithstanding any provision of sections 285.500 to 285.515 or any other provision of law to the contrary, for any taxpayer undergoing an audit conducted by the Department of Labor and Industrial Relations regarding the classification of an individual as an independent contractor or employee, if the taxpayer has been granted relief from the imposition of federal employment taxes under Section 530 of the Revenue Act of 1978, as amended, for an individual, with the result that the taxpayer can continue to classify the individual as an independent contractor for purposes of federal employment taxes, the Department of Labor and Industrial Relations shall allow the taxpayer to classify the individual as an independent contractor for purposes of Missouri employment taxes.

Both bills were read twice, and on February 4, 2015, were referred to the Committee on Employment Security.

VI. Nebraska

Nebraska L.B. 276 Would Exempt Certified Independent Contractors from Worker's Compensation

On January 14, 2015, State Senator Burke Harr (D) introduced L.B. 276, which would exempt certified independent contractors from the Nebraska Worker's Compensation Act.

The bill would amend the Worker's Compensation Act by adding, in relevant part, the following:

> A person who regularly and customarily performs services for others at a location other than that person's own fixed business location may apply to the Department of Labor to be a certified independent contractor. A certified independent contractor:
>
> (A) is exempt from all requirements to be covered under a policy of worker's compensation insurance pursuant to the Nebraska Workers' Compensation Act; and
>
> (B) is precluded from obtaining any benefits under the Act.

> To become a certified independent contractor, a person shall submit an application to the Department of Labor, on a form prescribed by the Department, which includes the following:
>
> > A completed certified independent contractor questionnaire;
> >
> > A completed and signed waiver of benefits form to waive all benefits under the Nebraska Workers' Compensation Act;
> >
> > Certification from the applicant that he or she has been and will continue to be free from control or direction in the performance of his or her services except as required for compliance with local, state, and federal regulations . . .
>
> The Department of Labor shall use the application and the applicant's answers to the certified independent contractor questionnaire to determine whether the applicant is qualified to be a certified independent contractor. The Department may, at its option, require documentation or other proof of any statements made on the application or questionnaire.

Additionally, the bill would amend R.R.S. Neb. §§ 48-106 and 48-116, to exclude certified independent contractors from the Worker's Compensation Act.

VII. New York

New York A.B. 735 May Provide Independent Contractors with the Right to Earn Sick-Time

Following similar efforts by other states, on January 7, 2015, Assemblymen Phil Steck (D) introduced A.B. 735 which potentially would provide independent contractors with the right to earn sick-time.

The bill would amend the New York Labor Law by adding a new article 32. Such amendments would require:

> All employers that employ fifteen or more employees and all employers of one or more domestic workers shall provide paid sick time and vacation time to their employees in accordance with the provisions of this article.
>
> Pursuant to the bill, sick time would be calculated as follows:
>
> All employers shall provide a minimum of one hour of sick time for every thirty hours worked by an employee, other than a domestic worker who shall accrue sick time pursuant to paragraph (B) of subdivision one of this section. Employers shall not be required under this article to provide more than forty hours of sick time for an employee

> in a calendar year. For purposes of this subdivision, any paid days of rest to which a domestic worker is entitled pursuant to subdivision one of section one hundred sixty-one of this chapter shall count toward such forty hours. Nothing in this article shall be construed to discourage or prohibit an employer from allowing the accrual of sick time at a faster rate or use of sick time at an earlier date than this article requires.

The following suggests that independent contractors would be subject to the provisions of the bill:

> The provisions of this article apply to (A) work study programs under forty-two U.S.C. section two thousand seven hundred fifty-three; (B) employees for the hours worked and compensated by or through a qualified scholarships as defined in twenty-six U.S.C. section one hundred seventeen; (C) *independent contractors who do not meet the definition of employee under subdivision two of section one hundred ninety of this chapter*; and (D) hourly professional employees.

However, it is unclear whether the foregoing reference to independent contractors expands the definition of "employee" or requires independent contractors that employ workers to provide such workers with sick time.

S.B. 309 Would Require Employers to Submit Information on Independent Contractors to the New York State Directory of New Hires

On January 7, 2015, State Senator Adriano Espaillat (D) introduced S.B. 309 which would require employers to submit to the state directory of new hires information on independent contractors. A companion bill, A.B. 1279, was introduced in the Assembly on January 9, 2015.

The bill would amend § 171-h(2)(a) of the New York Tax Law by including independent contractors within the definition of "employee" as follows:

> (a) "employee" means an individual who is an employee within the meaning of chapter twenty-four of the internal revenue code of 1986, including an individual under an independent contractor arrangement with contracts in excess of twenty-five hundred dollars, and does not include an employee of a federal or state agency performing intelligence or counterintelligence functions if the head of such agency has determined that a report made pursuant to this section with respect to the individual could endanger the safety of the employee or compromise an ongoing investigation or intelligence mission.

Accordingly, employers engaging such independent contractors would be required to comply with the following reporting requirements provided in § 171-h(3) of the New York Tax Law:

(3) Employer reporting requirements:

(a) General. Employers shall furnish to the state directory of new hires a report that contains the name, address, and social security number of each newly hired or re-hired employee who works in the state, and the employer's name, address, and identification number as assigned pursuant to section six thousand one hundred nine of the internal revenue code of 1986. Employers also shall report if dependent health insurance benefits are available and the date the employee qualifies for the benefits.

(b) Format. Each report shall be submitted on a W-4 (employee's withholding allowance certificate) form or, at employer option, an equivalent form and transmitted by first class mail, magnetically, or electronically to the state directory of new hires. In addition, if each report is submitted on a W-4, an additional form as prescribed by the department shall be submitted to report if dependent health insurance benefits are available and the date the employee qualifies for the benefits. That additional form shall be transmitted by first class mail, magnetically, or electronically to the state directory of new hires.

(c) Timing. Employers must submit reports to the state directory of new hires within twenty calendar days of the employer's hiring or re-hiring of the employee. However, in the case of an employer transmitting reports magnetically or electronically, by two monthly transmissions (if necessary), such reports shall be transmitted not less than twelve calendar days nor more than sixteen calendar days apart.

New York S.B. 2155 Seeks Same Compensation Guarantees for 1099 Workers as W-2 Employees

To assist independent contractors in gaining the same compensation guarantees as traditional W-2 employees, on January 21, 2015, State Senator Martin Golden (R) introduced S.B. 2155 which would authorize the Department of Labor to investigate complaints, make claims, and assess penalties against clients of independent contractors who fail to fully compensate their contractors.

The bill would amend the Labor Law by adding two new sections to be codified at NY CLS Labor § 196-b and NY CLS Labor § 196-c. The bill would define “independent contractor” to mean “a sole proprietor who is not an employee and who is hired or retained by a client for an amount equal to or greater than six hundred dollars.” Additionally, “client” would mean “a corporation, limited liability company, partnership, association or non-profitmaking organization contracting with an independent contractor,” but would not include a governmental entity or a person.

To assist independent contractors in obtaining compensation guarantees, S.B. 2155 provides:

> [A]n independent contractor shall be paid the compensation earned in accordance with the agreed work terms. If an independent contractor and client did not agree on a date for payment of compensation earned, the independent contractor shall be paid the compensation earned no later than the last day of the month following the month in which the compensation is earned.

To enforce such provision, the bill permits an independent contractor to file a complaint with the commissioner of the Department of Labor who would be authorized to:

> [I]nvestigate and attempt to adjust equitably controversies between clients and independent contractors . . . .
>
> [T]ake assignments of claims for compensation . . . [and] sue clients on compensation claims thus assigned
>
> On behalf of any independent contractor . . . bring any legal action necessary, including administrative action, to collect such claim and as part of such legal action, in addition to any other remedies and penalties otherwise available under this article, the commissioner shall assess against the client an additional amount as liquidated damages . . . no more than one hundred percent of the total amount of compensation found to be due.

Furthermore, in any legal action commenced by an independent contractor or the commissioner in which the independent contractor prevails, such independent contractor would be entitled to "all reasonable attorney's fees, prejudgment interest . . . and . . . an additional amount as liquidated damages equal to one hundred percent of the total amount of compensation found to be due."

However, any action to recover compensation under this article would have to be commenced within six years of its accrual. In addition, S.B. 2155 would not apply to "real estate brokers, associate brokers or salespersons licensed pursuant to article 12(A) of the Real Property Law; work performed on one or two family dwellings; or construction contractors or construction projects."

New York S.B. 572 Would Require Clients to Pay Independent Contractors in Accordance with Written and Agreed Upon Work Terms

On December 31, 2014 the New York State Senate introduced S.B. 572, which relates to the proper payment of independent contractors. Specifically, the bill would authorize the Department of Labor to investigate complaints, make claims for compensation, assess liquidated damages, and assess civil and criminal penalties. Additionally, the bill would authorize the awarding of attorney fees.

The bill would amend the New York Labor Code by adding two sections. First, the bill would add section 196-b, which would provide the following relevant definitions:

> 2. "Independent Contractor" means a sole proprietor who is not an employee and who is hired or retained by a client *for an amount equal to or greater than six hundred dollars*.
>
> 3. "Client" includes a corporation, limited liability company, partnership, association or non-profitmaking organization contracting with an independent contractor in any occupation, industry, trade, business or service for compensation equal to or greater than six hundred dollars. The term "client" *shall not include* a governmental entity, including but not limited to, an agency, board, department, commission of the state or any political subdivision thereof; and client *shall not include* a person. The term "client" *shall not include* owners of one and two-family dwellings.

For the purposes of the foregoing definition of "independent contractor," NY CLS Labor § 190.2 provides that the term "employee" means any person employed for hire by an employer in any employment.

Additionally, it is worth noting that the term "client" only includes business organizations and specifically excludes "a person." Therefore, it appears that individuals that engage independent contractors in their individual capacity are not covered by the bill.

The bill would also add section 196-c which would impose the following requirements on clients regarding payments to independent contractors. First, the bill would provide that independent contractors shall be paid in accordance with agreed work terms no later than the last day of the month following the month in which the compensation is earned, and the agreed work terms shall be reduced in writing, signed, and kept by the client for no less than six years. Specifically, the bill provides:

> An independent contractor shall be paid the compensation earned in accordance with the agreed work terms but not later than the last day of the month following the month in which the compensation is earned. The agreed work terms shall be reduced in writing, signed by both the client and the independent contractor, kept on file by the client for a period of not less than six years and made available to the commissioner upon request. Such writing shall include a description of how compensation earned and payable shall be calculated. The failure of a client to produce such written work terms, upon request of the commissioner, shall giver rise to a presumption that the terms that the independent contractor has presented are the agreed terms.

Additionally, the bill would provide independent contractors with the ability to file a complaint with the commissioner of the Department of Labor regarding a violation of this article:

> Any independent contractor may file with the commissioner a complaint regarding a violation of this article for an investigation of such compliant and statement setting the appropriate remedy, if any. Failure of a client to keep adequate records shall not operate as a bar to filing of a compliant by an independent contractor. In such a case the client in violation shall bear the burden of proving that the complaining independent contractor was paid compensation.

The bill would also provide that in the event that the commissioner brings legal action to collect compensation due"

> [o]n behalf of any independent contractor paid less than the compensation to which he or she is entitled under the agreed work terms under the provisions of this article, the commissioner may bring any legal action necessary, including administrative action, to collect such claim and as part of such legal action, in addition to any other remedies and penal ties otherwise available under this article, the commissioner *may assess against the client an additional amount as liquidated damages equal to twenty-five percent of the total amount of compensation found to be due, unless the client proves a good faith basis for believing that its underpayment of compensation was in compliance with the law*. In any action instituted in the courts upon a compensation claim by an independent contractor or the commissioner in which the independent contractor prevails, the court *shall allow such independent contractor reasonable attorney's fees* and, *unless the client proves a good faith basis to believe that its underpayment of compensation was in compliance with the law, an additional amount as liquidated damages equal to twenty-five percent of the total amount of compensation found to be due*. The remedies provided by this article may be enforced simultaneously or consecutively so far as not inconsistent with each other.

However, an action to recover compensation due under Article 6 must be commenced within six years.

The bill's final provisions would impose the following civil and criminal penalties on clients for willful violations:

> 10. If the commissioner determines that a client has violated a provision of this article, or a rule or regulation promulgated thereunder, by failing to pay the compensation of their independent contractors, the commissioner shall issue to the client an order directing compliance therewith . . . In addition to directing payment of compensation found to be due, *such order, if issued to a client who previously has been found in violation* of those provisions, rules or regulations, *or to a client whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due*.

11. Every client who does not pay the compensation of all of its independent contractors in accordance with the provisions of this chapter, and the officers and agents of any client who knowingly permit the client to violate this chapter by failing to pay the compensation of any of its independent contractors in accordance with the provisions thereof, *shall be guilty of a misdemeanor for the first offense* and upon conviction therefor shall be fined not less than five hundred nor more than twenty thousand dollars or imprisoned for not more than one year, and, *in the event that any second or subsequent offense occurs within six years of the date of conviction for a prior offense, shall be guilty of a felony* for the second or subsequent offense, and upon conviction therefor, shall be fined not less than five hundred nor more than twenty thousand dollars or imprisoned for not more than one year plus one day, or punished by both such fine and imprisonment, for each such offense.

VIII. Ohio

Ohio Senate Bill Would Prohibit Worker Misclassification

State Senator Kenny Yuko (D) and nine Democrat cosponsors introduced S.B. 25 on February 2, 2015, which would add a new section to the labor law prohibiting worker misclassification.

The bill provides that for purposes of minimum wage law, semimonthly payment of wage rules, wage and hour law, worker's compensation, unemployment compensation, and income taxes:

No employer shall fail to designate an individual who performs services for the employer as an employee unless [the individual satisfies the conditions of an independent contractor]. The director of commerce shall not use an employer's failure to withhold federal or state income taxes with respect to an individual or to include remuneration paid to an individual for purposes of [worker's compensation], or [unemployment compensation] when making a determination as to whether the employer violated this division. The director [of commerce] shall not use an individual's election to obtain workers' compensation coverage as a sole proprietor or a partnership in making a determination as to whether the individual has violated this division. The burden of proof is on the party asserting that an individual is not an employee.

Individuals satisfying all of the following conditions would be independent contractors:

(a) The individual has been and continues to be free from control and direction in connection with the performance of the service.

(b) The individual customarily is engaged in an independently established trade, occupation, profession, or business of the same nature of the trade, occupation, profession, or business involved in the service performed.

(c) The individual is a separate and distinct business entity from the entity for which the service is being performed or if the individual is providing construction services and is a sole proprietorship or a partner in a partnership, the individual is a legitimate sole proprietorship or a partner in a legitimate partnership to which section 4175.04 of the Revised Code applies, as applicable.

(d) The individual incurs the main expenses and has continuing or recurring business liabilities related to the service performed.

(e) The individual [is] liable for breach of contract for failure to complete the service.

(f) An agreement, written or oral, express or implied, exists describing the service to be performed, the payment the individual will receive for performance of the service, and the time frame for completion of the service.

(g) The service performed by the individual is outside of the usual course of business of the employer.

Additionally, the bill provides that a contractor in the construction industry:

is liable under this chapter for the failure of any subcontractor or lower tier subcontractor to properly classify individuals performing services related to construction as employees. A subcontractor is liable under this chapter for the failure of any lower tier subcontractor to properly classify individuals performing services related to construction as employees.

Furthermore, the bill would permit an employee, employer association, interested party, or labor organization to file a complaint with the Director of Commerce against an employer such party reasonably believes has engaged in worker misclassification. In response to a complaint the Director would conduct an investigation which may include visiting offices and job sites, and inspecting documents.

The Superintendent of Industrial Compliance would review the results of an investigation and if he determines that there is reasonable evidence that an employer engaged in misclassification he would order a hearing before the Director of Commerce. If the Director determines that an employer engaged in worker misclassification, the Director would be permitted to:

(1) Issue and cause to be served on any party an order to cease and desist from further violation of that section;

(2) Take affirmative or other action the director considers reasonable to eliminate the effect of the violation;

(3) Collect the amount of any wages, salary, employment benefits, or other compensation denied or lost to an individual because the employer misclassified the individual;

(4) Assess [a] civil penalty

Such a civil penalty would be $1,500 for an initial violation. Subsequent violations within a five year period would be assessed a penalty not less than $1,500 or more than $2,500.

However, if an employer *knowingly* misclassifies a worker, the penalties could be doubled. Moreover, an employer that knowingly misclassifies a worker, for the first offense, would be guilty of a misdemeanor of the fourth degree, and a felony in the fifth degree for any subsequent violation.

The bill would also provide for a private right of action. In such an action, which must commence within three years of the last day the aggrieved party worked for the employer alleged to have misclassified workers, a successful plaintiff would be awarded all of the following:

(1) The amount of any wages, salary, employment benefits, or other compensation denied or lost to an individual by reason of the violation, plus an equal amount in liquidated damages;

(2) Compensatory damages and an amount up to five hundred dollars for each violation of section 4175.02 of the Revised Code;

. . .

(4) Attorney's fees and costs.

The Director of Commerce would also publish a list of all employers who were found to have misclassified workers multiple times.

Moreover, the bill would require the Director of Commerce, the Director of Job and Family Services, the Tax Commissioner, and the Administrator of Worker's Compensation to share information concerning any suspected worker misclassification. In addition, upon determining that an employer has misclassified a worker, the Director of Commerce would be required to notify the foregoing directors of his determination so that they may determine whether the employer's misclassification would also violate worker's compensation, unemployment compensation, or income tax laws.

IX. Rhode Island

Rhode Island Independent Contractors to be Included in Definition of "Employee" for Purposes of Proposed H.B. 5149

To protect employees and independent contractors from abusive work environments, five Democrat state representatives led by Rep. Raymond Hull, introduced H.B. 5149 on January 21, 2015. The bill would prohibit employers from retaliating against an employee who complained of an abusive work environment.

H.B. 5149 would amend the labor laws by adding a new chapter 57. For the purposes of chapter 57, "independent contractors" would be included in the definition of "employee." Specifically, the bill provides the following prohibitions:

> No employer or employee shall subject another employee to an abusive work environment.
>
> No employer or employee shall retaliate in any manner against an employee who has complained of an abusive work environment under this chapter, or who has made a charge, testified, assisted, or participated in any manner in an investigation or proceeding under this chapter, including, but not limited to, internal complaints and proceedings, arbitration, and mediation proceedings, and legal actions.

Additionally, the bill would provide employees with a private right of action or the right to obtain a hearing with the Director of the Department of Labor and Training, in the event an employee reports abusive behavior to a supervisor and it is not resolved.

An employer found to have violated this chapter would potentially be enjoined from engaging in the unlawful behavior and/or ordered to "reinstate[] [the worker], remov[e] the offending party from the complainant's work environment," provide "back pay, front pay, medical expenses, compensation for emotional distress, and attorney's fees." In addition, the employer may be responsible for "any remedies provided under any other law." However, the bill would limit claims to those that occurred within the last three years.

X. South Dakota

South Dakota Bipartisan Group of Representatives Introduce H.B. 1105 to Distinguish Workers Exempt from Worker's Compensation Insurance

On January 26, 2015, State Representative Spencer Hawley (D) and State Senator Corey Brown (R) led a bipartisan group of representatives and senators to introduce H.B. 1105 which would create a rebuttable presumption that a person is not an employee for worker's compensation purposes.

The bill would amend the Worker's Compensation laws (S.D. Codified Laws § 62-1) by adding a new section whereby an individual considered "an independent contractor and is not otherwise covered under a worker's compensation insurance policy may sign an affidavit of exempt status." Such affidavit of exempt status "creates a rebuttable presumption that the affiant is not an employee for purposes of the South Dakota Worker's Compensation Act." Furthermore,

the person or business possessing the affidavit would not be responsible for a worker's compensation claim filed by the affiant.

Accordingly, H.B. 1105 would give individuals and businesses that engage independent contractors with a level of security and certainty that they do not have to provide worker's compensation coverage to contractors who present an affidavit described in the foregoing.

XI. Tennessee

Tennessee S.B. 171 Would Redefine Independent Contractor for Worker's Compensation Purposes

State Senator Bill Ketron (R) introduced S.B. 171 on January 27, 2015, which would redefine "independent contractor" for worker's compensation purposes. A companion bill, H.B. 558, was introduced in the House of Representatives on February 11, 2015.

The bill would amend the worker's compensation laws by deleting Tenn. Code Ann. § 50-6-102(11)(D) and replacing it with the following:

> In a work relationship, in order to determine whether an individual is an "employee," or whether an individual is a "subcontractor" or an "independent contractor," the following factors shall be considered:
>
> (a) The right to control the conduct of the work;
>
> (b) The right of termination;
>
> (c) The method of payment;
>
> (d) The freedom to select and hire helpers;
>
> (e) The furnishing of tools and equipment;
>
> (f) Self-scheduling of working hours; and
>
> (g) The freedom to offer services to other entities;
>
> A premium *shall not be charged* by an insurance company for any individual determined to be an independent contractor pursuant to this subdivision (11)(D);

XII. Utah

Utah H.B. 65 Would Permit the Unemployment Insurance Division to Distribute Information Regarding Employee Misclassification to the U.S. Department of Labor

Following similar efforts by other states to facilitate information sharing among government agencies, on January 26, 2015, State Representative Rebecca Edwards (R) introduced H.B. 65 which would permit the Utah Unemployment Insurance Division ("UI Division") to disclose information regarding the misclassification of workers as independent contractors to the United States Department of Labor ("DOL").

The bill would amend the unemployment insurance laws (Utah Code Ann. § 35A-4-312) by adding an additional paragraph permitting the UI Division to disclose the following information to the DOL:

> The name and identifying information of an employer found by the department to have misclassified one or more workers [for unemployment insurance purposes];
>
> The total number of misclassified workers for that employer; and
>
> The aggregate amount of misclassified wages for that employer.

XIII. Washington

Washington S.B. 5388 Would Require Independent Contractor Hires to be Reported to Washington State Support Registry

To assist in the collection of child support payments, on January 20, 2015, State Senators Jeannie Darneille (D), Jamie Pedersen (D), and Jeanne Kohl-Welles (D) introduced S.B. 5388 which would require a person or entity conducting more than $600 worth of business with an independent contractor to report the new hiring of such independent contractor to the Washington State Support Registry. A similar bill, H.B. 1801, was introduced in the House on January 29, 2015.

For these purposes, the bill would define "independent contractor" to mean an individual who:

> (a) Is free from direction and control over the performance of the service;
>
> (b) Performs the service either:
>
> (i) Outside of the usual course of business for the entity for which the service is performed; or
>
> (ii) Outside of all the places of business for which the service is performed; and
>
> (c) Is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service contract.

S.B. 5388 would require a person or entity working with an independent contractor to report "within twenty days of either entering into a contract with the independent contractor for compensation of six hundred dollars or more or making payments to the independent contractor totaling six hundred dollars or more" the independent contractor's "name, address, social security number, and date of birth." Additionally, the person or entity working with an independent contractor would be required to report their own "name, address, and, if applicable, the identifying number assigned under section 6109 of the internal revenue code of 1986."

Furthermore, the bill provides that persons or entities who fail to report would be subject to a civil penalty of:

(a) Twenty-five dollars; or

(b) Five hundred dollars, if the failure to report is the result of a conspiracy between the person or entity and the independent contractor not to supply the required report, or to supply a false report.

Washington H.B. 1519 and S.B. 5566 Would Redefine "Independent Contractor" and Imposes Penalties for Willful Misclassification

Twenty-one Democrat state representatives introduced H.B. 1519 on January 22, 2015, and fourteen Democrat state senators introduced a companion bill, S.B 5566 on January 23, 2015. The comprehensive bills would enhance the Department of Labor and Industries' ability to conduct investigations of suspected worker misclassification, and impose penalties on employers who misclassify workers. Additionally, the bills would redefine "independent contractor" as it relates to Washington's Public Contracts and Indebtedness title, Labor Code, and Industrial Insurance title.

First, the bills would add a new section to the Labor Code (RCW 49) entitled the "Employee Fair Classification Act." Within this proposed section, the bills would define "independent contractor to mean:

[A]n individual who performs labor or services for a party when either:

(i)(A) The individual is and will continue to be free from control or direction over the performance of the labor or services by the party for whom the labor or services are performed, both under the contract of labor or service and in fact. Control or direction includes the right to control or direct as well as general control or direction over the individual's physical activities;

(B) The labor or service is either outside the usual course of business for which the labor or service is performed, or the labor or service is performed outside of all the places of business of the enterprise for which the labor or service is performed; and

(C) The individual is customarily engaged in an independently established trade, occupation, business, or profession of the same nature as that involved in the contract of labor or service; or

(ii)(A) The individual is and will continue to be free from control or direction over the performance of the labor or services by the party for whom the labor or services are performed, both under the contract of labor or service and in fact. Control or direction includes the right to control or direct as well as general control or direction over the individual's physical activities;

(B) The individual's business is not financially dependent on the relationship with the party for whom the labor or services are performed and the business continues after the cancellation or destruction of the relationship with that party;

(C) The individual has a substantial investment of capital in the individual's business beyond ordinary tools and equipment and a personal vehicle;

(D) The individual gains profits and bears losses from the business as a result of his or her managerial skills and substantial investment of capital in the individual's business;

(E) The individual makes his or her labor or services available to the general public or the business community on a continuing basis;

(F) The individual files at the next applicable filing period, both under the contract of service and in fact, a schedule of expenses with the internal revenue service for the type of business the individual is conducting;

(G) The party for whom the labor or services are performed does not represent the individual as an employee of that party to its customers;

(H) The individual has the right, under contract and in fact, to perform similar labor or services for others on whatever basis and whenever he or she chooses;

(I) The individual has an active and valid certificate of registration with the department of revenue and an active and valid account with any other state agencies as required by the particular case, for the business the individual is conducting for the payment of all state taxes normally paid by employers and businesses and has registered for and received a unified business identifier number from the state of Washington; and

(J) The individual is maintaining a separate set of books or records that reflect all items of income and expenses of the business that the individual is conducting.

> (b) In determining whether an individual is an independent contractor, acts taken by an employer to comply with local, state, or federal laws or regulations may not be considered as proof of independent contractor status.

The bills would also redefine "independent contractor" for purposes of the Public Contracts and Indebtedness title (RCW 39.12.010), the Labor Code (RCW 49.52 and 49.48.082), and the Industrial Insurance title (RCW 51.08.070 and 51.08.180) in the same manner as set forth above.

Additionally, the bills would establish a *presumption* that an employer-employee relationship exists when "an individual performs labor or services for an employer." The presumption could, however, be rebutted by "establishing by a preponderance of the evidence that the individual is an independent contractor."

Furthermore, the bills would prohibit employers from *willfully* misclassifying an employee as an independent contractor. However, the Department of Labor would be prohibited from investigating a violation that occurred more than three years ago. Nonetheless, employers found to have engaged in willful misclassification would be subject to the following penalties:

> [A] civil penalty of: (i) Not less than one thousand dollars and not more than ten thousand dollars per employee; or (ii) if the person has engaged in a pattern or practice of violations, not less than ten thousand dollars and not more than twenty-five thousand dollars per employee;
>
> (i) Three times the amount of wages, salary, and employment benefits denied or withheld, except benefits under Title 50 or 51 RCW; and (ii) reimbursement for taxes and the value of any benefits paid by the employee;
>
> [P]ay any taxes owed, reinstate the employee, and properly classify the employee. The director may award front pay in lieu of reinstatement;

In addition, to the penalties imposed by the Department, the bills would permit an individual who believes he/she was willfully misclassified to bring a suit on "behalf of himself or herself or on behalf of any other individual who is similarly situated." Employers found liable in such a suit would be required to pay the greater of:

> Three times the amount of any wages including overtime, salary, and employment benefits unlawfully denied or withheld except benefits under Titles 50 and 51 RCW; or
>
> Statutory damages for each employee aggrieved by the violation. Statutory damages must not be less than one thousand dollars and not more than ten thousand dollars per employee, unless the person engaged in a pattern or practice of violations, in which case the statutory damages must be not less than ten thousand dollars and not more than twenty-five thousand dollars per employee;

Plus, the court may order "reimbursement for any taxes and the value of any benefits paid by the employee . . . attorney's fees and costs . . . any taxes owed and award injunctive or other equitable relief, including reinstatement and reclassification of the employee with terms and conditions at least as favorable as those that applied when the employee was misclassified, including rate of compensation, value of any benefits, and hours of work."

In order to apprise employees of their rights under this act, the bill would require employers that engage individuals as independent contractors to post the following:

> Every worker has the right to be properly classified as an employee rather than an independent contractor if the individual does not meet the requirements of an independent contractor under the law known as the employee fair classification act.
>
> If you believe you or someone else has been improperly classified as an independent contractor under the employee fair classification act, you have the right to challenge this classification by filing a complaint with the department of labor and industries or by bringing an action in state court.

Employers that do not post such notice would be subject to "a civil penalty of not less than one thousand dollars and not more than ten thousand dollars.

XIV. Wyoming

H.B. 59 Would Specify the Definition of Independent Contractor for Unemployment Compensation and Worker's Compensation Purposes

On January 22, 2015, State Representative Lloyd Larsen (R) introduced H.B. 59 which would add specificity to the definition of "independent contractor" for unemployment compensation and workers' compensation purposes.

The bill would amend the Unemployment Compensation Act (W.S. 27-3-104) and, in an almost identical manner, the Workers' Compensation Act (27-14-102(a)(xxiii)) as follows:

> 27-3-104. "Employment" defined; generally; exceptions.
>
> (b) An individual who performs service for wages is an employee for purposes of this act unless it is shown that the individual:
>
> (i) Is free from control or direction over the means and manner of the performance of services by contract and by fact;
>
> (v) Represents his services to the public and is customarily engaged as a self-employed individual or an independent contractor.

In addition the bill would add the following which further defines several of the foregoing terms:

> (D) as used in this section:
>
> > (I) "Free from control or direction" means that the independent contractor determines the means and manner of performing the contracted services and is free from the right of another person to control the means or manner by which the independent contractor provides services;
> >
> > (II) "Manner" means the method by which contracted services are performed, including but not limited to work schedules, work processes and work procedures;
> >
> > (III) "Means" are the resources used or needed in performing contracted services, including but not limited to tools, equipment, labor, devices, plans, materials, licenses, property, work location and assets.

Wyoming S.B. 135 Would Clarify Penalties for Knowingly Misclassifying an Employee

To clarify the penalties for misclassifying employees for worker's compensation and unemployment compensation purposes, State Senator John Hastert (D) introduced S.B. 135.

The bill would amend the worker's compensation laws (Wyo. Stat. § 27-3-703(a)) and unemployment compensation laws (Wyo. Stat. § 27-14-510(d)) to clarify that the penalties for knowingly making false statements or misrepresentations for worker's compensation purposes, or knowingly failing to furnish payroll reports for unemployment compensation purposes includes "knowingly failing to properly classify an individual as an employee."