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## Misclassification of employees as independent contractors will remain a top priority under new U.S. Secretary of Labor

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USA

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The new head of the U.S. Department of Labor (DOL) will emphasize independent contractor misclassification as a top priority.

Speaking this morning at a panel discussion in Chicago hosted by the American Bar Association's Section of Labor and Employment Law, U.S. Solicitor of Labor M. Patricia Smith said that U.S. Secretary of Labor Thomas E. Perez views misclassification of employees as independent contractors to constitute "workplace fraud."



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When an individual who should be classified as an employee is misclassified by an employer as an independent contractor, the misclassification usually results in a violation of multiple laws, Smith noted. Although the DOL's focus is on whether the misclassification results in a failure to meet minimum wage and/or overtime payment requirements under the federal Fair Labor Standards Act, the DOL also shares information with other federal and state agencies that are targeting misclassification. The DOL's multi-year misclassification initiative has resulted in formal memoranda of understanding with the Internal Revenue Service and 14 states, but the DOL also has informal arrangements with other states, Smith said. In some states, the DOL is engaging in joint enforcement efforts with state agencies.

In addition to the impact that misclassification has on federal and state payroll and unemployment taxes, Smith contends that misclassification also results in a greater divide between the "haves" and the "have nots."

During her comments, Smith identified several jobs and industries where the DOL often sees misclassification, including construction, janitorial, restaurant, delivery drivers, gas station attendants, nurse temps, security guards, and cable installers. Smith said that the conversion of individuals from being classified as employees to independent contractors, whether directly by the employer or indirectly through a labor broker or some other means, is a particular concern. Another issue that the DOL is exploring is the misclassification of individuals by federal contractors.

Smith said that damages can be difficult to quantify in misclassification cases because of a lack of records regarding the number of hours worked by the individuals whom the DOL contends should be treated as employees. Companies that are hit with misclassification lawsuits by the DOL should anticipate that the DOL will seek an immediate preliminary injunction requiring them to comply with federal record-keeping requirements with respect to these individuals.

Smith's comments regarding Perez, who has been on the job since July of this year, are not surprising. In March 2008, as Secretary of the Maryland Department of Labor, Licensing and Regulation, Perez testified before a Maryland legislative committee that misclassification is "a pervasive practice that cheats the state out of revenue, creates an unlevel playing field for businesses and deprives employees of their basic rights in the workplace."

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