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The Obama Years

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FLSA Developments:
**Misclassification as Independent Contractors, Unpaid Interns, the Status of
DOL Opinion Letters, and the Meaning of Clothes Under Section 3(0)**

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FLSA DEVELOPMENTS

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MISCLASSIFICATION AS INDEPENDENT CONTRACTORS

1. August 2009 GAO Report to Congress: Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention
 - a. “In fiscal year 2007, states uncovered at least 150,000 workers who may not have received protections and benefits to which they were entitled because their employers misclassified them as independent contractors when they should have been classified as employees.”
 - b. The GAO report is *available at* <http://www.gao.gov/new.items/d09717.pdf>.
2. The Obama Administration’s proposed budget includes a joint proposal by the Department of Labor and the Department of the Treasury to pursue employers that misclassify workers as independent contractors:
 - a. Delaware Employment Law Blog, Will “Misclassification Incentives” Reduce Employers’ Use of Independent Contractors?, Posted by Scott A. Holt on Feb. 12, 2010, *available at* http://www.delawareemploymentlawblog.com/2010/02/will_misclassification_initiat_1.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+delawareemploymentlawblog%2FUagR+%28Delaware+Employment+Law+Blog%29.
 - b. Hunton & Williams LLP, Proposed Federal Budget Targets Misclassification of Contractors, Posted on Feb. 12, 2010, *available at* http://www.huntonlaborblog.com/2010/02/articles/employeeindependent-contractor/proposed-federal-budget-targets-misclassification-of-contractors/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+HuntonEmploymentLaborLawPerspectives+%28Hunton+Employment+%26+Labor+Law+Perspectives%29.

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3. The IRS has entered into information sharing agreements with 29 state labor agencies through which the IRS and the agencies will share results from misclassification audits.
 - a. Dave Gram, IRS, States Crack Down on Independent Worker Abuse, The Associated Press, Feb. 11, 2010, *available at* http://www.google.com/hostednews/ap/article/ALeqM5hdqC3b6B0eL-uQ1C7O_sJPB7qNmAD9DQ5KL80.
 - b. Richard J. Reibstein, et al., Independent Contractor High Alert – The IRS and State Labor Departments Take Aim at Employee Misclassifications: How Employers Can Minimize Their Liability Risks, WolfBlock.com, HRAdvisor (January/February 2008), *available at* http://www.wolfblock.com/wbroot/files/Publication/Reib_Nix_Gall_HRAdvisor.pdf.
4. The Taxpayer Responsibility, Accountability, and Consistency Act of 2009, S. 2882, 111th Cong. (2009) (introduced by Sen. Kerry (D-MA); companion House bill, H.R. 3408, introduced by Rep. McDermott (D-WA)), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s2882is.txt.pdf.
5. The Independent Contractor Proper Classification Act, S. 2044, 110th Cong. (2007) (introduced by then-Sen. Obama (D-IL)), *available at* <http://www.appwp.org/documents/s2044110th.pdf>.
6. The Maryland Workplace Fraud Act, Code of Md. Regs. § 395.10, provides for new penalties for employers that misclassify workers, focusing on the landscaping and construction industries.
 - a. A discussion of the Act is *available at* <http://www.dllr.state.md.us/workplace/>.
7. The Illinois Department of Labor (“IDOL”) recently on behalf of 18 individuals issued a civil penalty of \$328,500 under the Illinois Employee Classification Act (“ECA”), against Elmwood Park, IL-based Mega Builders, Inc., for failing to classify the individuals as employees.
 - a. IDOL assessed penalties of \$1,500 per day for 218 total days of misclassification, as well as a \$1,500 penalty for failure to maintain proper records.
 - b. For the Illinois ECA, *see* State of Illinois Department of Labor, Employee Classification Act, <http://www.state.il.us/agency/idol/laws/Law185.htm>.
8. On May 25, Ohio H.B. 523 was introduced. This bill would create a single definition of “employee” that would be used in all Ohio statutes. The bill would also create a seven factor test, all of which would have to be met, for determining whether an individual is an independent contractor. The factors are: