



NEWS

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EMPLOYEE AND INDEPENDENT CONTRACTOR MISCLASSIFICATION



ROBERT C. WHITAKER, JR.

Each year, employers should evaluate their employment practices to ensure compliance with the ever-changing state and federal laws. In 2014, employers should pay particular attention to their classification of personnel as exempt employees and to the use of independent contractors.

Using exempt employees can save employers substantial money, as a properly exempt employee is not entitled to overtime compensation. However, many employers believe that simply paying an employee a salary renders them exempt. This is not true. With very limited exceptions, employees must satisfy a two-part test to be properly considered exempt under the Fair Labor Standards Act (FLSA) and New York law.

The first part of the test is called the salary basis test. This requires that an employee be paid no less than a minimum salary established by law. The U.S. Department of Labor (U.S. DOL) website advises employers that the minimum salary under federal law is \$455 per week. However, effective December 31, 2013, New York employers must pay exempt employees at least \$600 per week. This amount will increase to \$656.25 per week on December 31, 2014 and \$675.00 on December 31, 2015.

Second, employers must satisfy the job duties test. The particular requirements of this test vary depending on the exemption relied upon. There are numerous exemptions such as executive, administrative, professional and outside or commissioned sales employees. The most commonly relied upon exemption is the administrative exemption.

The job duties test for the administrative exemption requires that an employee's "primary duty" is the performance of office or non-manual work that is "directly related to the management or general business operations" of the company or its customers. Further the employee's primary duty must include the exercise of discretion and independent judgment relative to matters

of significance. Sound simple? It is not. The meaning of these requirements is frequently litigated. According to one study, 7,764 lawsuits were filed last year alone for alleged violations of the FLSA. This is an important issue for business owners, who may be held personally liable for such violations.

Additionally, New York continues to aggressively pursue the misclassification of employees as independent contractors. On November 18, 2013, the New York State Attorney General's Office signed an agreement with the U.S. DOL to aggressively pursue worker misclassification. This was reinforced by the New York Commercial Goods Transportation Industry Fair Play Act, which took effect April 10, 2014 and which targets the commercial trucking industry by creating a legal presumption that independent contractors are in fact employees. New York passed a similar law for the construction industry in October 2010.

Employers are often pursued for misclassification when an independent contractor files for unemployment benefits. At that point, employers are presented with a questionnaire from the Department of Labor. Many employers make the mistake of completing the form without consulting legal counsel first, and provide answers that are poorly worded or misconstrued and result in a finding of misclassification. The employer must then litigate the issue, or face liability for up to three years of back unemployment and workers' compensation insurance contributions. Further, the employer could be liable for unpaid overtime under the FLSA.

Misclassification of exempt employees and independent contractors is one of the most significant liabilities to employers. However, it is often overlooked and ignored until it is too late. Employers should be proactive and conduct self-audits to ensure proper compliance.

If you have any questions about misclassification issues, please contact **Bob Whitaker** at rwhitaker@hancocklaw.com.

CELEBRATING 125 YEARS OF ADVOCATING EXCELLENCE

PROTECTING YOUR BRAND: FEDERAL TRADEMARK REGISTRATIONS AREN'T JUST FOR BIG BUSINESS



ASHLEY D. HAYES

Company brands are important assets regardless of company size. While many companies spend significant resources building brand identity, far too frequently they fail to take measures to protect their brand, believing such measures to be cost-prohibitive. A variety of affordable brand protection options exist, however, including federal trademark registration.

THE REGISTRATION PROCESS

Federal trademark applications can be submitted electronically on the United States Patent and Trademark Office (PTO) website. The application must describe the mark at issue; identify its owner; provide a description of the goods and/or services offered under the mark; identify the PTO classes into which the goods and/or services fall; and if the mark is in use, provide a specimen showing use in commerce for each class. The PTO fee for a regular application is \$325 per class. You can file an “intent-to-use” application prior to using your mark in commerce, and it is never too late to consider submitting an application for an existing trademark. A PTO examiner reviews filed applications for compliance with PTO requirements and, if approved, a notice of registration is published in the PTO Official Gazette. Absent opposition, which must be initiated within 30 days, the registration will automatically issue after the 30-day window expires. Registrations are good for ten years and can be renewed for successive ten-year periods so long as the mark remains in use.

REGISTRATION BENEFITS

A federal registration can make trademark enforcement easier and often less expensive. Although unregistered marks are entitled

to protection, enforcement costs are often increased by debates over issues that federal registrations help to avoid. A registration permits use of the registration symbol and places others on constructive notice of the registration and the owner’s exclusive and nationwide right (with limited exceptions) to use that mark, which becomes incontestable after five years of continuous use. The registration provides a statutory presumption of validity and ownership of the mark in litigation and makes additional remedies available. It also bars others from obtaining a federal registration for confusingly similar marks and can provide benefits during business negotiations.

BEST PRACTICES

Prior to launching your mark, it is best to perform a search for similar preexisting marks. While search methods vary in cost, the cost will be far less than the alternative — having to defend your mark in court and/or change your company name or other marks. A search will also provide a sense for the likely success of your federal registration. After vetting your mark, file the application as soon as possible.

Monitoring the use of confusingly similar marks and taking appropriate action is important to maintaining your exclusive rights. Allowing others to use confusingly similar marks can weaken your mark and make enforcement more difficult. There are a variety of monitoring options, ranging from paid search providers to electronic alerts. When enforcement is necessary, a cease and desist letter is often sufficient.

If you have questions about any aspect of the trademark selection or registration process or other brand protection strategies, please contact **Ashley Hayes** at ahayes@hancocklaw.com.

MESSAGE FROM OUR MANAGING PARTNER



JANET CALLAHAN

Hancock Estabrook has been proud to call Syracuse our home since 1889.

As we celebrate our 125th anniversary, we reflect on the core values that have brought us this far and that we will continue to build on as we move forward – our uncompromising commitment to provide our clients with the highest caliber of legal

service and our equally strong commitment to make Central New York a better place to live.

We are dedicated to giving our clients excellent personal service. Our attorneys strive to meet – and exceed – our clients’ expectations for professionalism, communication and effective results. Our goal is to develop a comprehensive understanding of what our clients want and to get them there at a reasonable cost.

Hancock Estabrook has thrived over the past 125 years as a good corporate citizen, and we give back through our charitable contributions and our community service. Our attorneys and staff serve on boards and act as volunteers for many charitable organizations in and around Central New York. Our attorneys also provide hundreds of hours of free legal services each year to indigent clients and nonprofit organizations. We are proud of the work our people do and the ability of the Firm to support that work, to improve the lives of individuals and to strengthen our communities as a whole.

On behalf of the Firm, thank you for your trust, your friendship and your confidence in us. Most of all, thank you for allowing us to serve you.