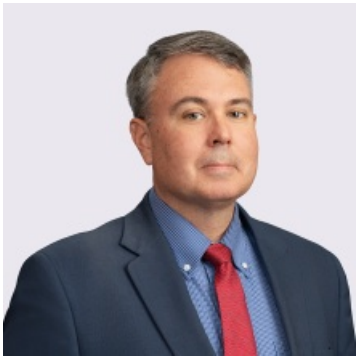


New Jersey Laws Aimed at Misclassification of Independent Contractors

By James M. McDonnell & Justin B. Cutlip

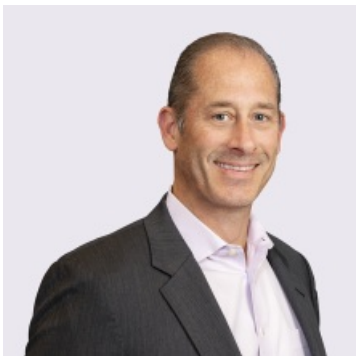
January 28, 2020

Meet the Authors



James M. McDonnell

Principal
908-795-5208
James.McDonnell@jacksonlewis.com



Justin B. Cutlip

Of Counsel
908-795-5136
Justin.Cutlip@jacksonlewis.com

Related Services

Staffing and Independent
Workforce
Technology
Wage and Hour

New Jersey has enacted a series of laws designed to penalize companies that misclassify individuals as independent contractors.

Governor Phil Murphy has signed six bills into law that require postings regarding misclassification, impose higher penalties for misclassification, permit the New Jersey Department of Labor and Workforce Development (NJDLWD) to issue stop work orders for violation of wage, benefit, or tax laws, and provide for joint liability for taxes in the event of a misclassification, among other measures. The effective date of each is noted below.

Posting Requirements

Beginning April 1, 2020, New Jersey Law will require businesses to conspicuously post notification on misclassification, “in a form to be issued by the commissioner,” and the NJDLWD to create and maintain a webpage containing the following:

1. The prohibition against employers misclassifying employees;
2. The elements of the ABC Test ([the bill to codify amendments to the ABC Test failed to advance](#) in the last legislative session);
3. The benefits and protections to which an employee is entitled under New Jersey wage, benefit, and tax laws;
4. The remedies under New Jersey law to which workers affected by misclassification may be entitled; and
5. Information on how a worker or the worker’s authorized representative may contact, by telephone, mail, and email, the NJDLWD to provide information or file a complaint regarding misclassification.

The penalty for failing to comply with the posting requirement, or retaliating against any individual who inquires or complains to the employer or NJDLWD about misclassification (or cooperates in any such proceeding), includes a disorderly persons offense and fines ranging from \$100 to \$1,000. Additionally, an employer will be required to reinstate any misclassified employee with backpay or correct any discriminatory action and pay all wages and benefits lost as a result of the discriminatory act. Employees will be entitled to punitive damages equal to two times lost wages and benefits and reasonable legal costs associated with any action.

Misclassification Penalties

Effective immediately, New Jersey law provides an administrative “misclassification penalty” in addition to any other penalties and fees that might be assessed for violation of state wage, benefit, or tax laws. The NJDLWD may assess a misclassification penalty of up to \$250 *per misclassified employee* for a first violation, and up to \$1,000 *per misclassified employee* for each subsequent violation.

This penalty cannot be assessed unless the commissioner provides notice of the violation, the amount of the penalty, and an opportunity to request a hearing. Other than unemployment or disability benefits law assessments, an employer will have 15 days to request a hearing as to the assessment of any such administrative penalty.

To determine the amount of the “misclassification penalty,” the NJDLWD will consider certain factors, including:

1. Prior violations by the employer;
2. The seriousness of the violation(s);
3. The employer’s good faith; and
4. The size of the employer.

The NJDLWD also may require an employer to pay the misclassified worker a penalty of not more than five percent of the worker’s gross earnings over the past 12 months.

Stop-Work Orders

Effective immediately, the NJDLWD may issue stop-work orders if it determines an employer violated state wage, benefit, or tax law. The NJDLWD is authorized to enter a place of business to determine compliance with state wage, benefit, and tax laws. It also has the authority to issue subpoenas for documents and witness testimony. The law provides for penalties and fines of at least \$1,000 each day an employer delays or otherwise hinders any such investigation.

The NJDLWD must provide seven days’ notice of its intent to issue any stop-work order. The stop-work order remains in effect until the issuance of a subsequent order by the NJDLWD upon a finding that the employer is in compliance with applicable law(s) and any penalties are paid. The stop-work order remains effective against any successor entity engaged in the same or an equivalent business, and the NJDLWD may issue civil penalties in the amount of \$5,000 per day for violation of the order.

The statute provides for appeal rights within 72-hours of the issuance of a stop-work order. Within seven business days’ receipt of any such appeal, the NJDLWD will hold a hearing on the order. To the extent the employer disagrees with the written decision, the employer may appeal further, in accordance with the Administrative Procedure Act.

Joint Liability

Effective immediately, New Jersey law provides for the joint liability of a client employer and labor contractor for violations of state wage and hour and state employer tax laws, including Workers Compensation Law, Unemployment Compensation Law, Temporary Disability Benefits Law, and New Jersey Gross Income Tax Act. The law, which amends an existing statute, provides that “any individual acting on behalf of an employer” may be held liable as the employer for any such violations. It also states that any such individual may be “an owner, director, officer, or *manager*” for the employer.

Posting of Personal Information of Violators

Effective immediately, the NJDLWD may post a list on its website of the name(s) of any person found to violate any state wage, benefit, or tax law based on a final order issued by the commissioner. A person on this list is prohibited from contracting with any public body until the liability for the violation(s) have been resolved to the satisfaction of the

commissioner.

The NJDLWD must provide notice to the person of the intent to post the name on the website 15 business days prior to the posting. The notice must include:

1. The name, email address, and telephone number of a contact person at the NJDLWD and a description of the procedure for removal;
2. Details of the violations and a copy of the unsatisfied court final judgment or final order;
3. Notification that the person is prohibited from contracting with a public body if the liability is not resolved; and
4. Notification that the person can request a hearing in writing to the commissioner within 20 days of receipt of the notice of intent to post.

If the person satisfies the final order or a settlement has been reached and all payment have been made prior to the date of posting on the NJDLWD's website, the posting will not occur. The NJDLWD must remove the name of a person from the website within 15 days after the person has satisfied the final order or settlement.

In deciding whether to place a person on the list, the commissioner must consider the following factors:

1. Previous violations;
2. Previous placement on the list;
3. Frequency of violations of the person;
4. Significance or scale of the violations;
5. Existence of any failure to pay;
6. Failure to cooperate or respond to a request to produce records, forms, documents, or proof of payment;
7. Submission of falsified or altered records, forms, documents, or proof of payment;
8. Failure to provide goods or services; and
9. Failure to comply with contract specifications.

Tax Information

Effective immediately, the state Treasury Department may share confidential tax files, including tax information statements, audit files, reports, returns, or reports from investigators. This will provide the NJDLWD additional information for targeted enforcement actions.

Companies with operations in New Jersey should consider conducting a self-audit to identify any employees misclassified as individual contractors and review their business models to ensure compliance with existing law on the classification of employees. Please contact a Jackson Lewis attorney with any questions.

©2020 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 1000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.