

Monthly Memo

BOTH EMPLOYEES AND NON-EMPLOYEES WORK TIME

MAY BE REQUIRED TO BE RECORDED PER FEDERAL LAW

Prior to Senator Ted Kennedy's passing, he had been the principal leader of Senate Bill 3684, which would have required employers to keep records of non-employees who perform labor or service for wages. The legislation would also provide a special penalty for employers who mis-classify employees as non-employees.

After the Senator's death, the bill was no longer able to go forward as Kennedy was the sponsor. However, Lynn Woolsey, the Congressperson for Marin County, introduced a very similar bill in the House of Representatives, House Resolution 5107. The pending House Resolution is named, "The Employee Mis-Classification Prevention Act (EMPA)."

The key element of the pending legislation is that time records of all workers, whether an employee or independent contractor, must be kept. There is a "presumption," that anyone who has performed services for a business is an employee. The employer has the burden of proving that the individual performing the work was not an employee. The evidence required to set aside the presumption (emphasis added) of employment, must be "clear and convincing."

The proposed federal legislation also requires that an employer must provide a written notice to all who provide services for the employer, with a copy of the law, no later than six (6) months after the person was being hired. The written notice is required to notify the individual receiving the notice to contact the federal Department of Labor if the individual believes she/he has any questions regarding their employment status. Additionally, the law would require, if the individual is not classified as an employee, the written statement "*Your right to wages, hours, and other protections depend on your proper classification as an employee or non-employee . . .*"

The penalties for an employer which is assessed a first-time violation, would not exceed \$1,100 or "in the case of a person who has repeatedly or willfully committed such violations, not to exceed \$5,000.00" - per employee.

The proposed federal statute provides that federal law will require State agencies to engage in a "system of measuring States' performance in conducting unemployment compensation tax audits, a specific measure of their effectiveness in identifying the under reporting of wages and the underpayment of unemployment compensation contributions."

If the proposed legislation is passed by the House of Representative, the U.S. Senate and signed into law by the President, the new rules will take effect 12 months after the date of passage of the statute. Those industries that have "frequent incidences or mis-classify employees as non-employees as determined by the Secretary of Labor" will be deemed a priority for federal audits.