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Client Notification Letter—SB 459 Independent Contractor Status

Attention Clients,

Effective January 1, 2012, California has a new law, Senate Bill 459 (SB 459), which significantly increases the penalties that can be assessed against employers who willfully misclassify as independent contractors individuals who should be treated as employees. If your business utilizes independent contractors, it is extremely important that you take the time now to understand the impact of this new law to your company and to take the necessary steps to ensure appropriate compliance with this law. The highlights of the law are summarized below for your reference, although they are not meant to be all-inclusive.

SB 459 makes it unlawful for any person or employer to engage in “willful misclassification” of an individual as an independent contractor. The law also prohibits charging individuals who have been misclassified as independent contractors a fee or making deductions (e.g., for space rental, goods, equipment maintenance) from compensation if those acts would have violated the law had the individuals not been misclassified.

This new law comes on the tail of the IRS’s recent announcement regarding its new settlement initiative, the Voluntary Classification Settlement Program (VCSP), allowing employers to: 1) come forward if they are not under audit, 2) reclassify independent contractors as employees, and 3) pay a significantly reduced employment tax.

Who has authority to assess compliance and penalties?

SB 459 authorizes the Labor and Workforce Development Agency, specifically the Labor Commissioner or a court, to assess specified civil penalties on persons or employers violating the law. SB 459 also requires the agency to take other specified disciplinary actions against these individuals.

What happens if I am found to have violated the law?

The law requires employers who are found to have engaged in a misclassification “to display prominently” for one year on their websites a notice to employees and the general public announcing, among other things, that the employer “has committed a serious violation of law by engaging in willful misclassification of employees.” The notice must be signed by a corporate officer.

What are the fines and penalties?

Violation of the new statute carries exposure for a civil penalty of between \$5,000 and \$15,000 for each violation. If the employer is found to have engaged “in a pattern or practice of violations,” the civil penalty is increased to \$10,000 and \$25,000 per violation. The law does not define the term “pattern or practice.”

Where should I go for assistance and additional information if I have independent contractors?

We strongly encourage you to consult with legal counsel experienced in employment practice matters to review your independent contractor relationships, to determine the appropriateness of these classifications, and to assist you if re-classifications may be required to mitigate potential legal exposures to your business.

Please call if you have any questions or would like to discuss this matter further.

Sincerely, **Mellon Johnson & Reardon, LLP**