For: LeClairRyan, Richmond, Va.
From: Parness & Associates, Aberdeen, N.J.

FOR IMMEDIATE RELEASE

Business Should Stay Vigilant About Contractor Vs. Employee Classifications, Warns Attorney
--Trump administration's pro-business stance doesn't change things, say LeClairRyan's Davis

RICHMOND, Va. (5/1/17)— During the Obama administration's two terms, businesses that misclassified employees as independent contractors were targeted by federal investigators. The recently elected Trump administration appears to be friendlier to commercial enterprises, but companies that supplement workforces with independent contractors should not view this as an invitation to misclassify workers, warns Betsy Davis, a shareholder in the national law firm's Richmond office, in a recent client alert.

To begin with, the federal Department of Labor guidance issued during the Obama Administration remains in effect, and "employers should expect DOL enforcement to continue," she writes. And even if federal government enforcement efforts are given a lower priority by the Trump administration, "employers should expect state departments of labor to fill the void under their joint enforcement initiatives. Employers should also anticipate that plaintiffs' class action lawyers will continue to target misclassification."

The penalties for misclassification are significant, and employers may be liable for unpaid minimum wages and overtime compensation; health and other benefits; denied medical leave; state and federal taxes; unemployment insurance and claims; and workers' compensation insurance and claims.

Under DOL guidelines, the focus has shifted to the economic realities test, weighing economic factors more heavily in the determination of an employee or independent contractor relationship, Davis notes.

"If the worker performs the primary type of work that the employer performs for its customers, then the factor weighs in favor of an employee relationship," she says. "If the worker provides a service to the employer's business, then the factor weighs in favor of an independent contractor relationship."

Risk of loss—or the possibility of losing money on the assignment—is another key consideration. A worker who is paid by the hour with no risk of loss is more likely to be an employee, as opposed to a worker who may suffer a loss of capital investment based on the manner in which he or she managed the project. Also, a worker who performs services only for one company and uses company equipment is more likely to be deemed an employee. In contrast, a worker who has formed an LLC, uses his or her own equipment and supplies, and performs services for a number of customers stands a better chance of being classified as a contractor.

Still, the DOL takes the position that "simply providing tools does not create an independent contractor relationship if the worker's investment is small when compared to the investment of the employer," Davis adds.

Time also matters. A lengthy work history weighs in favor of an employee relationship, while a specific project-based engagement weighs in favor of an independent contractor relationship. Finally, a worker who is subject to the company handbook, conduct rules, and specific direction for completing a project is likely to be considered an employee.

"The DOL characterizes misclassification as 'one of the most serious problems facing affected workers, employers and the entire economy,'" warns Davis. "The change in leadership in Washington will not impact an employer's need to comply. Government investigators and plaintiffs' attorneys are focused on the issue. Employers should focus on and review their worker classifications as well."

About LeClairRyan

As a trusted advisor, LeClairRyan provides business counsel and client representation in corporate law and litigation. In this role, the firm applies its knowledge, insight and skill to help clients achieve their business objectives while managing and minimizing their legal risks, difficulties and expenses. With offices in California, Connecticut, Delaware, Florida, Georgia, Illinois, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New York, Pennsylvania, Rhode Island, Texas, Virginia and Washington, D.C., the firm has approximately 350 attorneys representing a wide variety of clients throughout the nation. For more information about LeClairRyan, visit www.leclairryan.com.

###

Press Contacts: At Parness & Associates Public Relations, Bill Parness, (732) 290-0121, bparness@parnesspr.com or Lisa Kreda, lkreda@parnesspr.com