



New Rules for Contractors Classifying Workers as Employees v. Independent Contractors

By Arthur Yermash, Esq.

New York government recently enacted the New York State Construction Industry Fair Play Act (“New Act”). The intent behind this new law is to address misclassification of construction workers as independent contractors instead of employees. This law created a new standard for determining whether a construction worker is an employee or independent contractor. Additionally, it provides new penalties for employers who fail to properly classify their employees. The law is likely to have an ongoing impact on the construction industry and the costs associated with a construction work force.

Under this law, which became effective on October 26, 2010, a construction worker is presumed to be an employee—as opposed to an independent contractor—unless either one of the following applies

(1) the worker meets all three of the following criteria: (a) the worker is free from control and direction in performing the job, (b) the service performed is outside the usual course of work done by the business, and (c) the worker is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue. Only if all three criteria are met, then the worker may be considered an independent contractor.

OR

(2) the worker is a separate business entity, as determined by a 12-part test included in the new law to determine when a sole proprietor, partnership, corporation or other entity will be considered a “separate business entity.” In order for an entity to be considered an independent contractor, it must meet all of the 12 criteria, otherwise the entity appearing as a corporate entity will still be deemed an employee under New York State law. It will not be considered an employee of the contractor. Instead it will be a separate business that is itself subject to the new law regarding its own employees. The 12 criteria for a separate business entity can be found on the DOL [website](#).

The New Act also requires contractors to post notice in a prominent place at the business site that describes the responsibility of independent contractors to pay taxes required by state and federal law, the rights of employees to workers’ compensation, unemployment benefits, minimum wage, overtime, and other federal and state workplace protections, and the protections against retaliation and the penalties for failing to properly classify an individual as an employee.



The notice must also contain contact information for individuals to file complaints or to inquire about employment classification status. The notice is to be provided in English, Spanish, or other languages required by the labor commissioner and must also be constructed of materials able to withstand adverse weather conditions.

The New Act applies to all employers involved in constructing, reconstructing, altering, maintaining, moving, rehabilitating, repairing, renovating or demolition of any building, structure or improvement or relating to the excavation of or other development or improvement to land.

Employers who willfully violate the law are subject to civil penalties of up to \$2,500 for the first violation and up to \$5,000 for each subsequent violation within a five year period. This penalty may be assessed for each worker who is misclassified. Additionally, employers who violate the law may be guilty of a criminal misdemeanor, and subject to imprisonment for up to 30 days or a fine up to \$25,000 for the first offense, or imprisonment for up to 60 days or a fine up to \$50,000 for a subsequent offense. If the employer is a corporation, any officer or shareholder who owns or controls 10% or more of the corporation and who knowingly allows a violation of the law, may also be subject to civil and/or criminal liability. The new law also prohibits retaliation and requires a notice posting. The law explicitly states that violators may be subject to additional penalties for the misclassification of a worker with regard to unemployment compensation insurance, workers' compensation insurance, or business, corporate, or personal income taxes.

Where uncertainty exists as to the worker's proper classification, seeking legal guidance is a advised given the steep penalties under this law. Feel free to contact us should you have any questions about the new law

Clients who have any further questions or concerns about the information contained in this Advisory should not hesitate to contact us.

Joseph N. Campolo, Esq.
631.738.9100 x 301
jcampolo@cmmlp.com

Arthur Yermash, Esq.
631.738.9100 x 304
ayermash@cmmlp.com

ATTORNEY ADVERTISING: This publication may be considered "advertising material" under the rules of professional conduct governing attorneys in New York State. This advisory is for guidance only and not intended to be a substitute for specific legal advice. Prior results do not guarantee similar outcomes.