

## [New Pennsylvania Law Imposes Penalties for Misclassification of Independent Contractors in the Construction Industry](#)

November 22, 2010 by [Kelley Kaufman](#)

Independent contractor arrangements have come under fire lately from both state and federal governments. Pennsylvania recently went a step further, enacting legislation governing independent contractor arrangements in the construction industry. On October 13, 2010, the [Construction Workplace Misclassification Act](#) (the “Act”) was signed into law. The Act provides criteria for classifying independent contractors within the construction industry and imposes a variety of penalties for misclassifying employees as independent contractors.

### **I. What Are the Criteria for Independent Contractor Classification Under the Act?**

The Act specifies that, in order to be properly classified as an independent contractor under the Act, and also for purposes of Workers’ Compensation and Unemployment Compensation, an individual must:

1. Have a written contract to perform services in the construction industry for remuneration;
2. Be free from control or direction over the performance of such services – both under the contract and in fact; and
3. Be engaged in an independently established trade, occupation, profession or business with respect to such services.

Further, in order to meet the third part of the requirement, above, the individual must:

- Possess the essential tools, equipment and other assets necessary to perform the services;
- Be able to sustain a profit or a loss as a result of performing the services;
- Perform the services through a business in which he or she has a proprietary interest;
- Maintain a business location separate from the location of the person for whom he or she performs the services;
- Previously have performed the services for another while free from direction or control and under a contract of service and in fact; or hold him or herself out as an independent contractor; and
- Maintain liability insurance during the term of the contract of at least \$50,000.

The failure to withhold income taxes or to pay unemployment contributions or workers’ compensation premiums may not be considered as a factor in the independent contractor analysis.

### **II. What Constitutes a Violation Under the Act – and What Are the Penalties?**

An employer – or an officer or agent of an employer – may be subject to a variety of penalties under the Act if he or she fails to properly classify an individual as an employee for purposes of the Unemployment Compensation Law or the Workers' Compensation Act and fails to provide coverage required under those laws. Penalties may include both civil and criminal sanctions, as well as the possibility of a stop work order.

Civil penalties can range from \$1,000 per violation to \$2,500 per violation for first-time and repeat violations, respectively. In addition, a stop-work order may issue as a result of violations of the Act. Such an order requires misclassified individuals to cease work within 24 hours of the order, which may result in the cessation of all of the employer's business operations at each site where a violation occurred. Employers will be subject to an added \$1,000-per-day penalty for each day that they conduct business operations in violation of an order. The order will continue until a subsequent court order releases it.

The Act also provides for criminal penalties. Under the Act, each violation of independent contractor classification requirements will be graded as a second or third degree misdemeanor or a summary offense, depending upon whether the violation is found to be intentional or negligent. A summary offense conviction will require payment of \$1,000 or less.

Importantly, these penalties apply for violations separately – meaning each individual instance of independent contractor misclassification will be considered a separate violation under the Act. In addition, a non-employer third party who intentionally contracts with an employer knowing that the employer intends to misclassify employees also will be subject to the Act's penalty provisions.

**The Act goes into effect on February 10, 2011.** In the interim, construction industry employers should carefully review their independent contractor arrangements for compliance with the Act's criteria and take the necessary steps to ensure compliance on February 10, 2011 – and moving forward.

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