



LABOR & EMPLOYMENT DEPARTMENT

ALERT

POTENTIAL CRIMINAL AND CIVIL PENALTIES FOR PA CONSTRUCTION INDUSTRY EMPLOYERS THAT MISCLASSIFY WORKERS

By Erin T. Fitzgerald

On October 13, 2010, Pennsylvania Governor Edward Rendell signed the Construction Workplace Misclassification Act, which imposes criminal and civil penalties upon construction industry employers that misclassify workers as independent contractors. The rationale for the new law is to ensure employers pay unemployment compensation assessments, workers' compensation premiums and other employee expenses for individuals who are currently being misclassified as independent contractors. Additionally, it is an attempt to level the playing field for employers that are currently classifying employees appropriately and, as a result, must comply with certain wage and hour laws.

Criteria for Determining Independent Contractor Status

The Act provides that an individual who performs services in the construction industry for compensation is an independent contractor **only if** the individual has a written contract to perform such services, is free from control or direction over performance of such services and is customarily engaged in an independently established occupation, trade, business or profession in which he or she performs those services. In order to meet the last requirement – performance of those services in an independently established occupation – the individual must meet the following six criteria:

- Possess the tools and equipment necessary to perform the services;

- Profit or suffer a loss as a result of performing the services;
- Perform the services through a business in which the individual has a proprietary interest;
- Maintain a separate business location from the place the individual is performing the services;
- Have previously performed the same or similar services for another person or hold himself out to other people as able and available to perform similar services; and
- Maintain a minimum of \$50,000 in liability insurance for the duration of the contract.

Criminal Penalties, Civil Penalties and Stop-Work Orders

A construction industry employer violates this law when it fails to properly classify an individual as an employee under the Workers' Compensation Act or the Unemployment Compensation Law. Each individual who is misclassified constitutes a separate violation.

Once the secretary of the Department of Labor and Industry has received information that an employer has misclassified a worker, the secretary may investigate and issue an order to show cause why the employer should not be found to have violated the Act. Employers will have an opportunity to respond within 20 days of the order to show cause. If an employer fails to respond, the secretary can petition a court to issue a stop-work order

or can immediately assess penalties. If after an order to show cause, the secretary determines an employer intentionally failed to properly classify a worker, the secretary can also petition for a stop-work order. A stop-work order can require the cessation of work for only the individuals who are misclassified or can stop work at a site completely if a majority of the individuals at the site are misclassified.

The first intentional violation of the Act will result in a third-degree misdemeanor. Any subsequent intentional violation will result in a second-degree misdemeanor. If an employer does not misclassify an individual intentionally but is only negligent, the violation will constitute a summary offense with a fine of not more than \$1,000. A civil penalty may be assessed by the secretary in the amount of \$1,000 for a first violation and not more

than \$2,500 for each subsequent violation. An employer will also incur a penalty of \$1,000 per day if it conducts work after a stop-work order is issued.

Employers covered by the Act should at a minimum ensure they have written contracts in place with individuals who they classify as independent contractors rather than employees. Employers should also determine whether the individuals they classify as independent contractors meet all the criteria set forth in the bill.

If there is a concern that individuals have been misclassified or questions on how the individual should be classified, please contact Erin Fitzgerald at 215.299.3832 or efitzgerald@foxrothschild.com or any other member of Fox Rothschild's Labor & Employment Department before engaging the services or continuing to utilize that individual as an independent contractor.



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