

WORKERS' COMPENSATION

CLIENT ALERT by David G. Greene

WEBER GALLAGHER
SIMPSON STAPLETON
FIRES & NEWBY LLP

On October 13, 2010, Governor Edward G. Rendell signed into law House Bill 400, establishing the Construction Workplace Misclassification Act. This Law makes the intentional misclassification of construction workers a third-degree felony; and doing so because of negligence a summary offense, both of which carry significant fines.

In terms of the PA workers' compensation practice, this new law, could, for the first time, set a template for deciding future issues concerning whether a particular worker is an employee or an independent contractor. The Construction Workplace Misclassification Act (CWMA) states, that an individual who performs services in the construction industry is an independent contractor only if:

- (1) The individual has a written contract to perform such services;
- (2) The individual is free from control or direction over the performance of such services, both under the contract of service and in fact; AND [so all three must apply]
- (3) As to such services, the individual is customarily engaged in an independently established trade, occupation, profession or business.

With respect to the third criteria above, the CWMA states that an individual is customarily engaged in an independently established trade, occupation, profession, or business only if:

- (1) The individual possesses his/her own tools;
- (2) The individual's arrangement is such that he/she can realize a profit or suffer a loss as a result of performing services;
- (3) The individual performs services through a business in which the individual has a proprietary interest;
- (4) The individual maintains a separate business location; and
- (5) The individual previously worked as a bona fide independent contractor (as defined by the CWMA) or holds himself/herself out to the public as a bona fide independent contractor.

In addition to the fines noted above, the CWMA also permits the Secretary of the Dept of Labor and Industry to petition a court to issue a stop-work order.

While the CWMA is technically limited to the construction industry, we expect workers' compensation judges across PA to use this Law as a model or at least as guidance for the evaluation of employee/independent contractor issues in all or most types of industries.



David Greene is Vice-Chair of the Workers' Compensation practice at Weber Gallagher Simpson Stapleton Fires & Newby LLP. He frequently speaks and writes about workers' compensation issues. David can be contacted at 215.972.7910 or dgreene@wglaw.com.