



LABOR & EMPLOYMENT DEPARTMENT

ALERT

NEW YORK STATE ENACTS CONSTRUCTION INDUSTRY FAIR PLAY ACT

By John D. Horowitz

In its continuing efforts to crack down on employers who misclassify employees as independent contractors, the New York State legislature has once again set its sights on the construction industry. On August 31, 2010, New York State Governor David A. Paterson announced he signed the New York State Construction Industry Fair Play Act (Act). Under the Act, all individuals performing services for a construction industry contractor are presumed to be employees of that contractor. Accordingly, the contractor must comply with all state and local employment and tax laws – e.g., paying nonexempt employees minimum wage and overtime, providing workers’ compensation coverage and making all required withholdings and deductions from employees’ pay.

Moreover, the Act places the burden of proving a particular individual/entity qualifies as an independent contractor on the hiring contractor. In particular, to prove an individual is a bona fide independent contractor, the hiring contractor must show the worker: (1) is free from control and direction in performing the job (both in contract and in fact); (2) performs services that are outside the usual course of business for which the service is performed; and (3) is customarily engaged in an independently established trade, occupation, profession or business similar to the service at issue. With respect to showing that a “business entity” is performing work as an independent contractor, the contractor must satisfy a 12-

prong test, which includes proving: (1) the entity is performing services free from the hiring contractor’s direction or control; (2) the entity has a substantial investment of capital in the entity’s business, beyond ordinary tools and equipment or a personal vehicle; and (3) the entity gains the profits, and bears the losses, of its business.

Additionally, the Act requires construction industry employers to post a notice – available on the New York State Department of Labor web site – at the site where the construction services are being performed, which advises the individuals performing the services of their rights as employees. The Act also prohibits a contractor from retaliating against an employee who “blows the whistle” on the contractor’s violation of the Act and/or the contractor’s misclassification of the employee or refusal to pay the employee on the books. With respect to penalties, the Act provides for both civil and criminal sanctions against particular offending employers.

Significantly, the passage of the Act was motivated by the New York State legislature’s belief that New York’s construction industry is experiencing dangerous levels of employee misclassification fraud and some construction industry employers are intentionally reporting employees as independent contractors to state and federal authorities and workers’ compensation carriers in record numbers. The legislature cited a recent study indicating that as many as 50,000 New York City

construction workers – nearly one in four – are either misclassified as independent contractors or are employed by construction contractors completely off the books.

The message of the Act is clear – New York construction industry employers need to ensure that they are in full compliance with the statute and that the

independent contractor relationships they enter into satisfy the terms of the Act.

For more information concerning this Alert, please contact John D. Horowitz, Esq., at 212.878.7963 or jhorowitz@foxrothschild.com or any member of the firm's Labor & Employment Department.



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