

Driving change: New N.Y. law targets worker misclassification

New legislation that went into effect April 10 is intended to curtail misclassification of transportation industry workers as independent contractors instead of employees. The Commercial Goods Transportation Industry Fair Play Act significantly restricts the use of independent contractors and imposes other new requirements on New York transportation industry employers.

The law is another step in the state's effort to crack down on the use of independent contractors—and to recoup tax revenue not captured when a worker is classified as a contractor, not an employee. Employers must withhold state taxes from employee pay; not so for payments to independent contractors.

Presumption of employment

The centerpiece of the new legislation is the establishment of a presumed employment relationship for certain drivers who provide “commercial goods transportation services for a commercial goods transportation contractor.” They are now presumed to be employees. It's up to the businesses receiving such services to rebut this presumption by proving the driver in question is a bona fide independent contractor or constitutes a “separate business entity.”

Businesses failing to rebut the presumption of employment status through these tests will face significant penalties.

The act applies to all “commercial goods transportation contractors,” including any sole proprietor, partnership, firm, corporation, limited liability company, association or other legal entity that compensates a driver who possesses a state driver's license and transports goods in New York using a commercial motor vehicle.

A “commercial motor vehicle” includes a “motor vehicle used on a highway in intrastate, interstate or international commerce [that] has a gross vehicle weight rating or gross

combination weight of ten thousand one pounds or more, whichever is greater.”

Rebutting the presumption

A covered business can rebut the presumption of employment status in one of two ways.

First, the business can show the driver is a bona fide “independent contractor.” To do so, all of the following criteria must be met under the law's so-called “A-B-C” test:

A. The individual is free from control and direction in performing the job, both under his or her contract and in fact.

B. The service must be performed outside the usual course of business for which the service is performed.

C. The individual is customarily engaged in an independently established trade, occupation, profession or business that is similar to the service at issue.

Second, the business can show the driver is a “separate business entity.” To establish this alternative defense, the business must specifically show that each and every part of a detailed, 11-factor test is met.

Significant penalties

“Willful” violations are punishable by substantial civil and criminal penalties. Willful violations are defined as violations where a party “knew or should have known that his or her conduct was prohibited.” Civil remedies include a penalty of \$2,500 per misclassified worker for a first violation, and \$5,000 per misclassified worker for subsequent violations.

Criminal penalties include up to 30 days' imprisonment or a fine not to exceed \$25,000 for the first violation, and up to 60 days' imprisonment or a fine not to exceed \$50,000 for subsequent violations.

Corporate officers and shareholders who own or control at least 10% of the corporation's outstanding stock may also be charged. Noncompliant businesses, as well as certain

corporate officers and shareholders, may be “debarred” from public works contracts in New York for a period of up to one year for a first violation and up to five years in the event of subsequent violations.

Posting requirement

The law requires all commercial goods transportation contractors to post a notice describing:

- The responsibility of independent contractors to pay taxes
- Employees' rights to workers' compensation, unemployment benefits, minimum wage, overtime and other protections
- Protections against retaliation.

This notice must also contain contact information for individuals to file complaints or inquire with the commissioner of the New York State Department of Labor (NYSDOL) about employment classification status. It must be provided in English, Spanish or other languages required by the commissioner. NYSDOL will soon publish a model notice on its website.

Failing to comply with the posting requirement can result in penalties of up to \$1,500 for a first violation and up to \$5,000 for subsequent violations.

What it all means

New York has significantly raised the stakes for covered businesses in the transportation industry and their use of independent contractors. These businesses should carefully consider the potential implications of such use, as well as the other requirements imposed.

Given that this legislation is brand new, it remains to be seen how the NYSDOL and other state regulators will interpret and apply these new tests.

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