

ALERTS AND UPDATES

Pennsylvania Provides Stiff Criteria for Classifying Employees and Independent Contractors

October 15, 2010

To address the improper classifications of employees as independent contractors to gain certain tax benefits and avoid paying certain benefits, including overtime and Social Security, Pennsylvania Gov. Ed Rendell signed into law the Construction Workplace Misclassification Act (the "Act") on October 13, 2010. The Act establishes fixed criteria distinguishing an independent contractor from an employee. The Act also provides for both civil and criminal penalties if an employer misclassifies an employee as an independent contractor.

Requirements for Independent Contractor Status

Under the Act, which goes into effect on February 10, 2011, an individual will only be considered an independent contractor if he or she has a written contract to perform construction services; is free from control or direction over performance of such services; and is customarily engaged in an independently established trade, occupation, profession or business.

An individual is only considered engaged in an independently established trade, occupation, profession or business if he or she:

1. possesses the essential tools, equipment and other assets necessary to perform the services;
2. can realize a profit or suffer a loss as a result of performing the services;
3. performs services through a business in which he or she has a proprietary interest;
4. maintains a business location separate from the location of the person for whom the services are being performed;
5. previously performed the same or similar services for another person as an independent contractor or holds himself or herself out as an independent contractor; and
6. maintains liability insurance of at least \$50,000.

Civil Penalties for Failing to Properly Classify an Employee

If an employer fails to properly classify an individual as an employee, civil penalties of up to \$1,000 for the first violation and up to \$2,500 for each subsequent violation can be assessed against the employer. Misclassifying multiple employees would be treated as multiple violations to the Act.

In addition, in certain cases, a court may issue stop-work orders that require the cessation of work, which could delay a construction project and potentially expose the employer to increased liability.

Criminal Penalties for Failing to Properly Classify an Employee

Employers, officers or agents who intentionally violate the Act can be convicted of a misdemeanor of the third degree for the first offense and a misdemeanor of the second degree for a second or subsequent offense, which can be punishable by imprisonment.

Similarly, employers, officers or agents who negligently violate the Act can be convicted of a summary offense and be sentenced to pay a fine of up to \$1,000.

Protections from Retaliation

The Act provides that it shall be unlawful for an employer to take any adverse action against any individual in retaliation for exercising rights protected by the Act, which include the right to file a complaint and inform an employer about its noncompliance with the Act. To the extent that an employer takes any action against an individual within 90 days of the person's exercise of rights under the Act, the Act provides a rebuttable presumption that such adverse action was retaliatory.

For Further Information

If you have any questions about the information addressed in this *Alert*, please contact any [member](#) of our [Employment, Labor, Benefits and Immigration Practice Group](#), any [member](#) of our [Construction Group](#) or the attorney in the firm with whom you are regularly in contact.

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