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Classifying Workers: New Maryland Standards

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A worker's classification as an employee or as an independent contractor has important ramifications. The consequences to workers of being classified as an employee include entitlement to a variety of rights and benefits, such as minimum wage and overtime pay, unemployment, workers' compensation, Social Security and federal and state tax withholdings. For employers, classifying workers as employees means incurring additional financial costs, being held accountable to significant additional federal and state legal requirements and being more vulnerable to "unionization."

For the construction and landscaping industries, the issue has become more complicated in Maryland with the passage of the "Workplace Fraud Act of 2009." Four states — New Jersey, Massachusetts, Michigan and Iowa — have passed similar legislation, and many other states are considering it. Proponents of the law contend that it will prevent intentional misclassification of workers and produce additional tax revenues for Maryland. Opponents contend that it forces "unionization of employees," decreases work by Maryland-based companies and ultimately costs Maryland revenue. However, all agree that the new legislation (which becomes effective on October 1, 2009) fundamentally changes Maryland's definition of an "employee."

Traditionally, Maryland generally mirrored the federal law, which determines a worker's status based upon a multiple factor "economics reality test." The new law abandons this approach by instead mandating that construction and landscaping companies doing business in Maryland use the "ABC test." Under this test, workers are considered employees unless (a) they are free from direction and control over their performance of the work; (b) the service is performed either outside the usual course of the business for which it is performed, or is performed outside the usual course of all places of business of the enterprise for which it is performed; and (c) the individual is customarily engaged in an independent trade, occupation, profession or business.

Maryland's Labor Commissioner is authorized to investigate possible violations of the new law on the Commissioner's own initiative; on receipt of a written complaint; or on referral from another State agency. During the investigation, the Commissioner is permitted to enter the employer's place of business or work site to observe work, interview individuals and copy records.

The new bill imposes significant record-keeping requirements. For at least three years, employers must keep records of each worker's classification, pay rate, hours worked and the amount paid during each pay period. Moreover, workers classified as independent contractors must be provided with written notice of their classification, as well as information regarding the implications of being an independent contractor or an employee.

Violators of the new law face draconian penalties. For a first violation, an employer who knowingly misclassifies an employee is subject to a fine of up to \$5,000 for each employee misclassified; for the second violation, \$10,000 for each employee; and for the third violation, \$20,000 for each employee. In addition, an employer who fails to provide the Labor Commissioner with records regarding an individual worker's classification within 15 days of a request is punishable by a fine of at least \$500 per day for each day the records are not produced.

A person who assists, advises or facilitates an employer to misclassify employees is subject to a civil penalty of up to \$20,000. While the civil penalty is not applicable to accountants or attorneys, these professionals can be referred to their professional regulatory bodies for sanctioning.

In addition to government enforcement, individual workers can bring civil actions against an employer who knowingly and improperly misclassifies them as independent contractors. The action must be brought within three years of the violation, and if the action is successful, the prevailing worker is entitled to treble damages and attorneys' fees. Conversely, workers found to have made a groundless complaint against an employer are only subject to an administrative penalty not to exceed \$1,000.

A new day is dawning. Construction companies and landscaping companies, beware.

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