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WHAT YOU NEED TO KNOW - Pennsylvania Construction Workplace Misclassification Act

By Thomas L. Isenberg, Jr.

On October 13, 2006, House Bill No. 400 was signed into law as the Construction Workplace Misclassification Act. The Act was designed and passed to address the improper classification of employees as independent contractors in an attempt to gain certain tax, worker's compensation and unemployment insurance benefits. As more fully set forth below, the Act establishes fixed criteria to distinguish an independent contractor from an employee and further sets forth civil and criminal penalties for violations of the same.

Who is an independent contractor?

The Act provides that, an individual will be considered an independent contractor only if he/she: (1) performs services in the construction industry pursuant to a written contract; (2) is free from control or direction over his/her performance of such services (both contractually and in fact); and, (3) is customarily engaged in an "independently established trade, occupation, profession or business". In this regard, an individual is engaged in an independently established trade, occupation, profession or business if he/she: (1) possess 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/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/herself out as an independent contractor; and, (6) maintains liability insurance of at \$50,000.

What are the civil penalties?

For each individual who is not properly classified as an employee, a civil penalty of up to \$1,000 for the first violation and up to \$2,500 for each subsequent violation may be assessed against the employer. In addition, in certain circumstances, a stop-work order may be issued which may further delay the construction project thereby exposing the employer to increased liability and subsequent damages.



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What are the criminal penalties?

An employer, officer or agent of the employer who negligently misclassifies an employee as an independent contractor commits a summary offense which carries a fine of not more than \$1,000. However, if it is found that an intentional violation of the Act has occurred, such employer, officer or agent of the employer will be found to have committed a third degree misdemeanor for the first offense and a second degree misdemeanor for all subsequent offenses.

What if my subcontractor violates the Act, can I be held responsible?

The Act provides that a party that does not meet the definition of “employer” but which intentionally contracts with an employer knowing that such employer intends to misclassify employees in violation of the Act, shall be subject to the same penalties, remedies and other actions as the employer found to be in violation of the Act. In other words, contracting with

a subcontractor knowing that the subcontractor intends to misclassify its employees subjects you to the exact same civil and criminal penalties.

When does the Act take effect?

There is time to review and assess your employee and/or independent contractor status, as well as modify your contracts, as the Act does not take effect until February 11, 2011. ■



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