

## **New York Enacts Construction Worker Misclassification Law**

**September 10, 2010**

On August 27, New York Governor David A. Paterson signed into law the New York State Construction Industry Fair Play Act (the Act), designed to curtail worker misclassifications in the construction industry. The Act resulted from findings that nearly one in four construction workers in New York are misclassified as independent contractors or are paid “off the books.” The Act, which goes into effect on October 26, 2010, amends the New York Labor Law, the New York Unemployment Insurance Law, and the New York Workers’ Compensation Law by creating a rebuttable presumption that *all* construction workers are employees under those laws. The Act also imposes notice requirements and subjects contractors to civil and criminal penalties for willful misclassification of workers.

### **Scope of the Act**

The Act applies to general contractors and subcontractors who are permitted by law to do business within New York State and who engage in construction, regardless of the contractor’s corporate form. The Act defines construction as “constructing, reconstructing, altering, maintaining, moving, rehabilitating, repairing, renovating or demolition of any building, structure, or improvement, or relating to the excavation of or other development or improvement to land.”

### **Employment Presumption**

Under the Act, any person performing work for a contractor covered by the Act will be deemed an employee of the contractor unless the worker (i) is free from the contractor’s control and direction in performing the job, both under his or her contract and in fact; (ii) performs services that are outside the contractor’s usual course of business; and (iii) is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service to be performed for the contractor. Only if all of these criteria are met will the construction worker be considered an independent contractor and not an employee of the contractor.

The Act also creates a “separate business entity” exception that allows a sole proprietor, partnership, corporation, or person to be considered independent from the contractor if it meets the following 12-part test set forth in the Act. To qualify as a separate business entity, the entity must meet the following criteria:

- 1) Be performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of the contractor for whom the service is provided to specify the desired result

- 2) Not be subject to cancellation or dissolution upon severance of the relationship with the contractor
- 3) Have a substantial investment of capital in the business entity beyond ordinary tools and equipment and a personal vehicle
- 4) Own the capital goods and gain the benefits and bear the losses of the business venture
- 5) Make its services available to the general public or the business community on a continuing basis
- 6) Include services rendered on a federal income tax schedule as an independent business or profession
- 7) Perform services for the contractor under the business entity's name
- 8) Obtain and pay for a license or permit in the business entity's name when such are required
- 9) Furnish the tools and equipment necessary to provide the service
- 10) Hire its own employees without contractor approval, pay the employees without reimbursement from the contractor, and report the employees' income to the Internal Revenue Service
- 11) Not be represented by the contractor as an employee of the contractor to the contractor's customers
- 12) Have the right to perform similar services for others on whatever basis and whenever it chooses

A business meeting the "separate business entity" definition will not be considered an employee of the contractor, but will itself be deemed a contractor under the Act, and will be required to comply with all of the provisions of the Act applicable to contractors with respect to its own engagement of workers.

### **Posting**

The Act mandates that contractors post at the worksite a statement from the Commissioner of Labor that explains workers' rights, penalties proscribed for misclassifications, tax responsibilities for independent contractors, rights of employees to unemployment insurance benefits, workers' compensation, minimum wage, and other federal and state workplace protections.

The notice, which will be available on the New York State Department of Labor's website (<http://www.labor.ny.gov>) within 30 days of the Act's effective date, must be posted in a prominent place, in English and Spanish and/or other languages as appropriate, and must contain contact information for individuals to file complaints or inquire with the Commissioner about employment classification status. The notice must be constructed of materials capable of withstanding adverse weather conditions. Contractors violating the notice requirements of the Act are subject to civil penalty of up to \$1,500 for a first violation, and up to \$5,000 for a subsequent violation within a five-year period.

### **Worker Misclassification Penalties**

Contractors that willfully misclassify an individual as an independent contractor are subject to a civil penalty of up to \$2,500 per misclassified employee for a first violation and up to \$5,000 per misclassified employee for each subsequent violation within a five-year period. In addition to civil penalties, willful violators may be charged with a criminal misdemeanor offense. Upon conviction of a first offense, violators face a fine of up to \$25,000 or imprisonment of up to 30 days. Upon conviction of a subsequent offense, violators face a fine of up to \$50,000 or imprisonment of up to 60 days. Other penalties may also apply under the state's unemployment insurance; workers' compensation insurance; or business, corporate, or personal income tax laws.

Further, if the contractor is a corporation, any officer of the corporation or shareholder who owns or controls at least 10% of the outstanding stock of such corporation who knowingly permits the corporation to willfully violate the law may also be subject to civil and criminal penalties. In the event of a criminal conviction, the Act provides for debarment from public works contracts for one to five years.

## **Retaliation**

The Act prohibits employers from retaliating against any employee for exercising any rights granted under the Act, including, but not limited to, making complaints to an employer or causing any proceeding to be initiated under the Act. Any employer that engages in retaliatory actions can be subjected to a private cause of action, to the penalties described above, or both.

## **Implications**

This Act applies a stringent standard to worker classification in New York's construction industry. Because the Act redefines how construction workers are classified and imposes stiff penalties for willful construction worker misclassification, construction firms should immediately review their existing worker classifications, develop strategies to comply with these new standards, and address potential risks associated with misclassified workers.

Morgan Lewis regularly advises employers with respect to all aspects of federal and state laws implicated by worker classification, including laws relating to payment of taxes, overtime and other compensation, benefits, and immigration. If you have any questions or would like further information on any of the issues discussed in this Morgan Lewis LawFlash, please contact the author of this LawFlash, **Thomas A. Linthorst** (609.919.6642; [tlinthorst@morganlewis.com](mailto:tlinthorst@morganlewis.com)), or any of the following Morgan Lewis attorneys:

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