

**Ruskin Moscou Faltischek's
Construction Law Capabilities**

- Civil and municipal litigation
- Arbitration and mediation
- Contract drafting and negotiation
- Employment law and labor relations
- Mechanic's liens
- Payment and performance bond claims
- Prevailing wage claims
- Project finance
- Joint venture and development agreements

Construction Law Group Members

Joseph R. Harbeson, Chair
(516) 663-6545
jharbeson@rmfpc.com

Adam L. Browser
(516) 663-6559
abrowser@rmfpc.com

Douglas A. Cooper
(516) 663-6576
dcooper@rmfpc.com

Matthew F. Didora
(516) 663-6579
mdidora@rmfpc.com

Michael L. Faltischek
(516) 663-6550
mfaltischek@rmfpc.com

Thomas A. Telesca
(516) 663-6670
ttelesca@rmfpc.com



RUSKIN MOSCOU FALTISCHEK P.C.

Smart Counsel. Straight Talk.

East Tower, 15th Floor
1425 RXR Plaza, Uniondale, NY 11556-1425
516.663.6600 ▼ www.rmfp.com

Attorney Advertising

**Are You Ready For The Fair
Play Act?**

By Joseph R. Harbeson, Esq. and Adam L. Browser, Esq.



Joseph R. Harbeson

On October 26, 2010, the New York State Construction Industry Fair Play Act went into effect. This new statute is likely to have an enormous impact on the construction industry by imposing stringent requirements for any worker to qualify as an independent contractor. Indeed, many have voiced the concern that the Act will effectively end the use of most independent contractors.



Adam L. Browser

The Act's intent is to stop the misclassification of workers as independent contractors, which has been a prevalent practice in the industry. Studies show that misclassification in construction runs as high as 15%, more than 50% higher than in other sectors. It is estimated that nearly fifty thousand New York City construction workers are either misclassified or work off the books. The result of this misclassification is reduced government taxes, workers not covered by workmen's compensation and an unfair cost advantage to contractors that do not properly classify their workers.

To achieve its ends, the law presumes that any person performing work for a contractor is an employee. There are two ways to overcome the presumption, but it is difficult to satisfy either standard. One way is to demonstrate that the work is performed by a separate business entity. There are twelve factors that are looked at to determine whether the work is being performed by a separate business entity, including whether the entity makes its services available to the general public on a continuing basis, and whether there is a substantial investment in the entity beyond tools, equipment and a vehicle. Each of the twelve factors, and not merely some, must be satisfied in order for the person or entity to be considered an independent contractor. The other way to overcome the presumption is to meet a different three-part test, which includes showing that the worker is free to control and direct the work. All three steps must be satisfied to overcome the presumption.

The law also requires contractors (and subcontractors) to post a notice that, among other things, describes an independent contractor's

responsibility to pay taxes, the rights of employees to workers' compensation and other benefits, and penalties if the contractor does not properly classify a worker as an employee. The notice must be in English, Spanish and any other language required by the Commissioner of Labor, and posted in a prominent and accessible place on the job site. The Department of Labor will issue and post the notice on its website so that contractors and subcontractors can download it.

Failure to comply with the notice requirements is initially punishable by a fine of up to \$1,500. Subsequent violations are punishable by a \$5,000 fine.

Failure to properly classify a worker is punished more severely and can bring both civil and criminal penalties. A contractor who willfully violates the law is subject to a civil fine of \$2,500 per misclassified worker for an initial violation and \$5,000 for each subsequent violation. In addition, willful violation is a misdemeanor punishable by thirty days imprisonment and a \$25,000 fine for a first violation. Subsequent willful violations are punishable by sixty days in prison and a \$50,000 fine.

If the contractor is a corporation, any officer and any shareholder holding 10% or more of the stock is also subject to the civil and criminal penalties if he knowingly permits the corporation to violate this law.

In addition, any contractor, officer or shareholder that is convicted of a misdemeanor under this law is subject to debarment and would be ineligible to submit a bid or be awarded any public works project for up to one year for an initial violation, and up to five years for a subsequent violation.

New York State and New York City need revenue to close large budget deficits. They view misclassification of workers as a lost source of revenue and an opportunity to assist in their budgetary problems. Thus, it is reasonable to believe that the State and the City will make a concerted effort to enforce the law. Considering the likelihood of enforcement, and the harsh penalties imposed by the New York State Construction Industry Fair Play Act, contractors and subcontractors must ensure that they comply with this new law.

*For additional information on this or any construction law related issue, please contact RMF's Construction Law Department chair: **Joseph R. Harbeson**, who can be reached at (516) 663-6545 or jharbeson@rmfpc.com, or **Adam Browser** who can be reached at (516) 663-6599 or abrowser@rmfpc.com.*



East Tower, 15th Floor
1425 RXR Plaza, Uniondale, NY 11556-1425
516.663.6600 ▼ www.rmfp.com

Copyright © 2010 Ruskin Moscou Faltishek, P.C. All Rights Reserved.