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Are You Ready For The Fair Play Act?

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.

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. It is possible, but difficult, to overcome the presumption. An individual may overcome the presumption if: (a) he or she is free from the contractor's direction and control in performing the work; (b) the work is performed outside the usual course of business for whom the work is performed; and (c) he or she is customarily engaged in an independent trade, occupation, profession or business that is similar to the work at issue. All three of these criteria must be met.

To be considered a separate business entity, and not an employee, a company must satisfy a twelve-factor test. Some of these factors are whether the entity has the freedom to direct and control the work, 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. All of the twelve factors, and not merely some, must be satisfied in order for the company to be considered a separate business entity.

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



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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, indeed all municipalities, 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 will make a concerted effort to enforce the law. It is also reasonable to believe that the government will look for a high profile prosecution to encourage compliance. 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. Their counsel should advise them proactively to avoid the significant repercussions.

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