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****EMPLOYMENT LAW ALERT****

Construction Workplace Misclassification Act

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All employers who are in the construction industry, or who provide services for the construction industry, beware. On October 13, 2010, Governor Ed Rendell signed into law the Construction Workplace Misclassification Act, which is designed to address the misclassification of construction industry employees as independent contractors for purposes of workers' compensation and unemployment compensation.

This Act:

- Provides a specific definition of independent contractor;
- Provides for criminal and civil penalties for misclassification;
- Applies to companies, their officers and agents and to some individuals contracting with companies who misclassify workers;
- Allows the state government to shut down jobs if misclassification is rampant;
- Prohibits any person from requiring any individual enter an agreement or sign a document that results in the improper classification of that individual as an independent contractor;
- Prohibits retaliation against any person exercising rights protected by the Act, including filing a complaint under the Act;
- Creates a rebuttable presumption that taking an adverse action against a person within 90 days of the person's exercise of rights was done in retaliation for exercising of those rights.

The Act applies to individuals who perform services for pay in the construction industry. Construction is defined as the “erection, reconstruction, demolition, alteration, modification, custom fabrication, building, assembling, site preparation and repair work done on any real property or premises under contract,” whether public or private.

Under the Act, an individual is an independent contractor for purposes of workers’ compensation and unemployment compensation only if the following criteria are met:

- The individual has a written contract to perform the services;
- He or she is free from control or direction over performance of the services, both under the contract and in fact;
- The individual is customarily engaged in the service in an independently established trade, occupation, profession, or business, which occurs only if:
 - The individual has the tools, equipment or other assets necessary to perform the services independent of the person for whom services are performed;
 - The individual will have a profit or loss as a result of performing the services;
 - The individual performs the services through a business in which the individual has a proprietary interest;
 - The individual maintains a business location separate from that of the person for whom services are being performed;
 - The individual either previously has performed the services for another person under the circumstances set forth above for independent contractors, or holds himself out to others as being able and available to perform these services; and
 - The individual maintains liability insurance of at least \$50,000.00 during the term of the contract.

Evidence that no employee taxes have been withheld, or that unemployment compensation contributions or workers’ compensation premiums have not been paid on the individual, has no bearing on whether the individual is in fact an independent contractor.

A violation of the Act occurs each time an employer, officer or agent improperly classifies an employee and does not pay unemployment compensation contributions or provide workers’ compensation insurance for the individual. Such violations need not be intentional.

The violations also extend beyond employers, officers and agents to reach any party that intentionally contracts with an employer, knowing that the employer intends to misclassify employees in violation of the Act. Any such parties are subject to the same penalties as the employer.

There is a potential defense if the person for whom services are performed believed in good faith at the time the services were performed that the person was an independent contractor. The party claiming the defense must prove good faith belief, which may be hard.

The potential penalties for violations are eye-opening. First, violators, including officers and agents, may be found criminally liable. A first violation for an intentional violation of the Act will be a misdemeanor of the third degree. Any subsequent intentional violation will be a misdemeanor of the second degree.

Even a negligent violation may draw a criminal penalty. Such violations will be summary offenses, subject to a fine of not more than \$1,000.00 per violation. Prior convictions under the Act can be used as evidence of intent to violate the Act.

In addition to criminal penalties, a violator may be subject to civil fines of not more than \$1,000.00 for a first violation, and not more than \$2,500.00 for each subsequent violation.

The Secretary of Labor and Industry also may petition a court for a stop-work order, either for the individual classified as an independent contractor, or, if several individuals are misclassified, requiring the cessation of all business operations of that employer at each site where a violation occurred within 24 hours of the effective date of the order. The order remains in effect until the court releases it, or until a finding that the employer no longer is in violation of the Act. If an employer ignores a stop-work order, it will be subject to a penalty of \$1,000.00 per day.

A stop-work order and any penalties shall remain in effect against any successor corporation or business entity that has one or more of the same principals and officers as the employer that had the stop-work order or penalties, and which is engaged in the same or equivalent trade or activity.

In the past, entities have tried to ensure the status of workers as independent contractors by entering into contracts whereby the individual agrees that he or she is an independent contractor, and meets the criteria for that status. Going forward, entities will need to be much more careful in using this tool. The Act makes it unlawful for any person to require or demand that an individual enter an agreement or sign a document that results in improper classification of an individual. The penalty is a fine of \$1,000.00 to \$2,500.00 for each violation.

The Act also prohibits discrimination or retaliation in any manner against any person exercising rights protected under the Act. Rights protected include filing a complaint or

informing any person about an employer's noncompliance with the Act. If an adverse action is taken within 90 days of the person's exercise of any rights under the Act, a court will presume it is retaliatory. It will be the employer's burden to prove otherwise, which may be hard to do.

The Act will take effect on February 10, 2011 (120 days from enactment).

WHAT DOES THIS MEAN FOR YOU?

If you do any business that is within the definition of "construction" under the Act, you should take this opportunity to review all independent contractor relationships to make sure they conform to the requirements set forth in the Act. If they do not, the individual should be reclassified as an employee. This Act has both criminal and civil penalties that are far-reaching. Penalties may be assessed not only against your company, but also may be against individual officers and agents. The stop-order penalty could shut down your business. This Act must be taken seriously.

Even if you are not in the construction industry, this Act is instructive of how the legislature views independent contractor relationships, and the kind of evidence that may be necessary in the future to establish such relationships in all fields.

If you have any questions about this or any other employment or labor issue, please call Whitney Rahman or John Roland at 610-372-5588.