NEW YORK LEGISLATION CHANGES THE LANDSCAPE OF WORKER CLASSIFICATION LAW IN THE CONSTRUCTION INDUSTRY

Labor & Employment Alert
September 17, 2010

On October 26, 2010, the Construction Industry Fair Play Act becomes effective in New York. As a result of this sweeping piece of legislation, for the first time in New York history, there will be a legal presumption that all persons performing services for a "contractor" in the "construction" industry are employees. This employee presumption can be rebutted only if a construction contractor establishes that the person meets the act's three-part "independent contractor" test or its "separate business entity" test.

Under the three-part independent contractor test, the worker must: (a) be free from direction and control in performing the job, under both his or her contract and in fact; (b) perform his or her services outside the usual course of business for which the service is performed; ***and*** (c) be customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue.

To be considered a "separate business entity," a worker must perform services through an entity that:

1. Is free from direction or control over the means and manner of providing the service, subject only to the right of the contractor to specify the desired result;

2. Is not subject to cancellation or destruction upon the end of the relationship with the contractor

3. Has a substantial investment of capital in its business beyond ordinary tools, equipment, and a personal vehicle;

4. Owns its capital goods, realizes its profits, and bears its losses;

5. Makes its services available to the general public or the business community on a continuing basis;

6. Includes the services rendered on a federal income tax schedule as an independent business or profession;

Attorneys

Peter Godfrey

John Godwin

Practices & Industries

Labor & Employment

Worker Classification & Employment Tax

7. Performs services for the contractor under its own name;

8. Obtains and pays for any required license or permit in its own name;

9. Furnishes the tools and equipment necessary to provide its services;

10. Where necessary, hires its own employees without contractor approval, pays them without reimbursement from the contractor, and reports their income to the IRS;

11. Is not represented as an employee of the contractor to customers; ***and***

12. Has the right to perform similar services for others on its own terms."

While many of these factors are familiar, what is new is that construction contractors must now satisfy all of the factors to be classified as an "independent contractor" or a "separate business entity." It is irrelevant whether workers are bona fide independent contractors under the traditional common law test; they must meet one of the Act's tests to continue to be classified as independent contractors.

The law also contains broad anti-retaliation provisions and important new notice posting obligations for construction contractors. There are severe civil and criminal penalties for contractors who "willfully" fail to properly classify a worker as an employee under the act. And importantly, any officer of a contractor or shareholder who owns or controls at least 10 percent of its outstanding stock may be personally liable for the civil and criminal penalties if he or she "knowingly permits" his or her company to willfully violate the provisions of the act.

Also, in what may be a harbinger of things to come for New York worker classification enforcement generally, the Construction Industry Fair Play Act takes bold steps to facilitate information sharing among the various New York State agencies regarding worker classification. Specifically, the act requires that the Workers' Compensation Board, the Department of Taxation and Finance, and the Commissioner of Labor share information regarding all cases of misclassification with each other shortly after one of them identifies an instance of misclassification.

Bottom Line for Employers: The Construction Industry Fair Play Act significantly raises the cost of misclassification to construction contractors. Because misclassification of employees as independent contractors can result in significant civil and criminal liability, construction industry employers should immediately review their relationships with workers and service providers to determine whether they are in compliance and make modifications as necessary.