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Independent Contractors in the Construction Industry

The New York State Construction Industry Fair Play Act took effect on October 26, 2010. The law creates a new standard for determining whether a worker is an employee or independent contractor in the construction industry. It provides new penalties for employers who fail to properly classify their employees.

The Act defines construction as the: "... 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." It includes work performed at commercial sites and residential properties. It can also include work performed by a retail business installing a product or improvement for a customer.

New Standard: The law presumes that any person performing services for a contractor shall be classified as an employee, unless the person is a separate business entity as defined below, or all of the following criteria are met, in which case the person will be considered an independent contractor.

The individual is:

- A. Free from control and direction in performing the job, both under contract and in fact;
- B. Performing services outside of the usual course of business for the company; and
- C. Engaged in an independently established trade, occupation, or business that is similar to the service they perform.

Separate Business Entity Test

To be considered a separate business entity from the business to which services are provided, a sole proprietor, partnership, corporation, or other entity must:

- (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 to specify the desired result;
- (2) Not be subject to cancellation when its work with the contractor ends;
- (3) Have a substantial investment of capital in the entity, beyond ordinary tools and equipment and a personal vehicle;
- (4) Own the capital goods, gain the profits, and bear the losses of the entity;
- (5) Make its services available to the general public or business community on a regular basis;
- (6) Include the services provided on a federal income tax schedule as an independent business;
- (7) Perform the services under the entity's name;
- (8) Obtain, and pay for, any required license or permit in the entity's name;
- (9) Furnish the tools and equipment necessary to provide the service;

- (10) If necessary, 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) Have the right to perform similar services for others on whatever basis and whenever it chooses; and
- (12) The contractor does not represent the entity, or the employees of the entity, as its own employees to its customers.

The entity must meet all 12 criteria to be considered a separate business entity. If it does meet all 12 criteria, it will be considered a separate business that is itself subject to the new law regarding its own employees.

Coverage: The law applies to all contractors in the construction industry, as previously defined.

Agencies covered: The new standard for determining employment status applies to determinations under the Labor Law (including labor standards, the prevailing wage law, and unemployment insurance) and the Workers' Compensation Law. It does not apply to determinations under the New York State Tax Law, as the New York State Department of Taxation and Finance will continue to use its existing standards for determining employment status. The penalties provided by the new law apply to determinations of misclassification as defined in the Labor Law, Workers Compensation Law, and the New York State Tax Law.

Penalties: An employer that willfully violates the Fair Play Act by failing to properly classify its employees will be subject to civil penalties of up to \$2,500 per misclassified employee for a first violation and up to \$5,000 per misclassified employee for a second violation within a five-year period. Employers also may be subject to criminal prosecution (a misdemeanor) for violations of the act with a penalty of up to 30 days in jail or up to a \$25,000 fine, and debarment from bidding on Public Work projects for up to one year, for a first offense. Subsequent misdemeanor offenses would be punishable by up to 60 days in jail or up to a \$50,000 fine, and debarment from performing Public Work for up to five years. Where the contractor is a corporation, officers and shareholders who own or control 10% or more of the corporate stock shall also be subject to these sanctions if they knowingly permit the violation to occur.

The full text of the Fair Play Act appears on the department's web site at www.labor.ny.gov.