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Department
of Labor

FAIR PLAY ACT

New York State 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.

Studies estimate that anywhere from 15 to 25 percent of construction workers may be misclassified in New York State. Employee misclassification occurs when employers treat workers who should be considered employees as independent contractors or simply do not report them (pay them “off the books”).

NEW STANDARD

The law presumes that individuals working for an employer are employees unless they meet all three criteria below. The individual must be:

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

SEPARATE BUSINESS ENTITY

The law also contains a 12-part test to determine when a sole proprietor, partnership, corporation or other entity will be considered a “separate business entity” from the contractor for whom it provides a service. If an entity meets all of the 12 criteria, it will not be considered an employee of the contractor. Instead it will be a separate business that is itself subject to the new law regarding its own employees. The 12 criteria for a separate business entity appear on the back page of this fact sheet.

COVERAGE

The law applies to all contractors in the construction industry. Construction is defined as including 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.

AGENCIES COVERED

The new standard for determining employment applies to determinations under the Labor Law (including labor standards, prevailing wage law and unemployment insurance) and the Workers’ Compensation Law. It does not apply to determinations under the New York State Tax Law. 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 under 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 a \$2,500 fine 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, up to a \$25,000 fine and debarment from Public Work for up to one year for a first offense. Subsequent misdemeanor offenses would be punishable by up to 60 days in jail, up to a \$50,000 fine and debarment from performing Public Work for up to five years.

Employers also remain subject to all of the existing penalties, taxes and restitution for Labor Law, Workers' Compensation Law and Tax Law violations that result from the worker misclassification. Corporate officers and certain shareholders may be personally liable for the fines and penalties under the Act, where they knowingly permit the violations to occur.

POSTING

Construction industry employers must post a notice about the Fair Play Act in a prominent and accessible place on the job site. The required notice is available on the Department of Labor's web site. Failure to post the notice can result in penalties of up to \$1,500 for a first offense and up to \$5,000 for a second offense.

CONTACT US

If you have any questions concerning the Fair Play Act or if you wish to report suspected worker misclassification, please call the Department of Labor toll-free at **866-435-1499** or e-mail us at dol.misclassified@labor.ny.gov.

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

To find out more about the New York State Department of Labor go to www.labor.ny.gov.

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 and 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. 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.
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.