

# EMPLOYEE MISCLASSIFICATION

## Criminal and Civil Penalties Now Possible for Misclassification of Independent Contractors

By Marc Furman, Esq. and Ericson P. Kimbel, Esq.

On February 10, 2011 the Pennsylvania Construction Workplace Misclassification Act (the Act) went into effect. The Act includes criminal penalties for those who misclassify their own employees, or those who contract with a company while knowing that company's intent to misclassify its employees as independent contractors. Other penalties for violation include fines, incarceration, stop-work orders and administrative penalties. As stated by the Pennsylvania Department of Labor & Industry (DLI), the Act's enforcement agency, "misclassification of employees as independent contractors is illegal for all commercial and residential construction in Pennsylvania," and it applies to all public and private projects.

The Act defines construction to include "erection, reconstruction, demolition, alteration, modification, custom fabrication, building, assembling, site preparation and repair work done on any real property or premises..." 43 P.S. §933.2. This broad definition appears to include all aspects of vertical construction.

In order to be considered in compliance under the Act, an independent contractor must (1) have a written contract, (2) be free of control or direction of the work, and (3) be customarily engaged in an independently established trade, business or

profession. The third element includes the following criteria: ownership of one's own tools, realization of profit or loss from that business, prior work as an independent contractor, a separate business location and maintenance of at least \$50,000 of liability insurance. If the above elements are not satisfied, the purported independent contractor will be considered an "employee" under the Act and the above listed penalties may be imposed upon the employer (or an officer or agent of the employer) and, in certain circumstances, upon those who contract with the employer.

Could a general contractor found to be liable for civil and/or criminal penalties also be held liable for its subcontractor's employees' back benefits and taxes?

Further, each misclassified independent contractor is considered a separate violation of the Act. There are criminal and civil fines up to \$1,000 for a first violation and up to \$2,500 for each subsequent violation. Other criminal penalties include a third degree misdemeanor for a first violation and second degree misdemeanor for subsequent violations.

The back benefits and taxes owed under the Act may far outweigh the other monetary penalties. Liability for unpaid unemployment and/or workers' compensation benefits, federal, state and local taxes, and other remittances for multiple employees, together with penalties and interest, could reach into the hundreds of thousands of dollars.

Just as troubling is the concerted action provision under the Act. That section provides that a contracting party "which intentionally contracts with an employer knowing the employer intends to misclassify employees in violation of this act, shall be subject to the same penalties, remedies or other actions as the employer..." 43 P.S. §933.4(e) (emphasis added). Thus, liability extends from the non-compliant employer to the contracting party when the contracting party enters into the contract knowing of this problem. The language of this section

To avoid possible non-compliance, all independent contractor and subcontractor relationships should be reviewed.

raises several obvious issues concerning intent and proof of intent.

A finding of concerted action treats the concerted actor as the employer for purposes of the "penalties, remedies or other actions" under the Act. Could a general contractor found to be liable for civil and/or criminal penalties also be held liable for its subcontractor's employees' back benefits and taxes? Could pursuit of such recovery only occur when a subcontractor is insolvent? These and other questions are not answered by the text of the Act.

The Act does include a good faith defense, which provides "it shall be a defense to an alleged violation of this section if the person for whom the services are performed in good faith believed that the individual who performed the services qualified as an independent contractor at the time the services were performed." 43 P.S. §933.4(f). All persons alleged to have violated the Act will obviously attempt to assert this defense.

The Act addresses two other types of violations. A party may not require or demand an agreement or document which results in a misclassification under the Act. Monetary penalties for violation of this provision are in the same amounts as those set forth above. It is also a violation to retaliate against any person for exercising one's rights under the Act.

Finally, the DLI has the ability to issue a stop work order. 43 P.S. §933.4(c). If the employer does not respond to a DLI investigation, the DLI has the option of petitioning a court for a stop work order, or immediately assessing penalties. The stop work order is effective 24 hours after the date of issuance. The impact of a stop work order would be devastating to an employer's cash flow, current contractual relationships and future attempts to obtain work. It would also disrupt job progress, most likely cause delays and impact all parties up the contractual chain.

To avoid possible non-compliance, all independent contractor and subcontractor relationships should be reviewed. Contractual provisions regarding the Act should be included in all forthcoming contracts and independent contractor agreements. All project sites should also be posted with the Act requirements poster. The DLI has provided a work site poster, a guidance statement and a misclassification complaint form on its website, [http://www.dli.state.pa.us/portal/server.pt/community/li\\_home/5278](http://www.dli.state.pa.us/portal/server.pt/community/li_home/5278).

Marc Furman is a Partner and Chair of the Labor & Employment Group at Cohen Seglias Pallas Greenhall & Furman, PC. Ericson P. Kimbel is Senior Counsel at Cohen Seglias Pallas Greenhall & Furman, PC.

D E S I G N E R   S E R I E S

### Architectural CMU



- Split Face
- Ground Face
- Blasted Face
- Two-Tone Blends

*Expert Design Consultation and Samples Available Upon Request*

**610-833-1100**  
www.fizzano.com

