

Governor Paterson Signs Into Law the New York State Construction Industry Fair Pay Act

On August 31, 2010, Governor Paterson signed into law the [New York State Construction Industry Fair Play Act](#), (S. 5847-F and A. 8237-D). The law's main purpose is to create a presumption that individuals employed by contractors in the construction industry are employees rather than independent contractors.

The Act created a new Article 25-B in the New York Labor Law that creates the presumption that a person hired by a contractor in the construction industry is an employee unless the following three conditions are met: "(A) the individual is free from control and direction in performing the job, both under his or her contract and in fact; (B) the service must be performed outside the usual course of business for which the service is performed; and (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue."

In addition, the Act requires contractors to conspicuously post an onsite notice (to be published by the Commissioner of Labor) that, among other things, "describes the responsibility of independent contractors to pay taxes required by state and federal law, the rights of employees to workers' compensation, unemployment benefits, minimum wage, overtime and other federal and state workplace protections, and the protections against retaliation and the penalties in this article if the contractor fails to properly classify an individual as an employee." The notice must also include contact information for individuals to file complaints or inquire with the Commissioner of Labor about classification status.

Further, any contractor who willfully violates the law by misclassifying an employee as an independent contractor will be subject to civil and criminal penalties. Notably, the term "willfully violates" is defined as when "a contractor knew or should have known that his or her conduct was prohibited by this section." The civil penalty is up to \$2,500 for the first violation per misclassified employee and up to \$5,000 for each subsequent violation per misclassified employee in the five-year period following the first violation. Any contractor who willfully violates the section can also be guilty of a misdemeanor punishable by no more than thirty days imprisonment or up to a \$25,000 fine for a first offense, and imprisonment for not more than sixty days or \$50,000 for any subsequent offenses.

The Act also prohibits retaliation against an individual who has made or threatens to make a complaint that rights have been violated under the article, for causing any proceeding to be brought under the article, or for testifying or providing information concerning a violation.

This post was authored by [Matt Lampe](#) and [Kristina Yost](#) of [Jones Day](#).

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