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New York State Takes Aim at Worker Misclassification: The Commercial Goods Transportation Industry Fair Play Act

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On Friday, January 10, 2014, Governor Cuomo signed into law the New York State Commercial Goods Transportation Industry Fair Play Act (the Act). The Act amends the New York Labor Law[1] to create a presumption that any person performing commercial goods transportation services for a commercial goods transportation contractor shall be classified as an employee, *unless* the individual satisfies the stringent independent contractor or separate business entity tests set forth in the new law. The Act takes effect on the sixtieth day after it became law, or on March 11, 2014. Underlying the Act's genesis was a study which found that, in New York State, nearly 40,000 employers misclassified more than 700,000 workers, with misclassification disproportionately high in the trucking industry.

This alert highlights the key provisions of the law, including the independent contractor and separate business entity standards, the new notice requirements, enforcement, and applicable penalties.

Coverage

Under the Act, a "commercial goods transportation contractor" is a New York sole proprietorship, partnership, corporation, or other business entity that compensates commercial drivers who have a commercial driver's license to transport goods in New York State. The presumption of employment applies to all persons performing transportation services for such an entity, *unless* the person is an independent contractor or a separate business entity. The new law identifies distinct criteria for satisfying either the independent contractor test or the factors for evaluating whether the commercial goods transportation contractor is in fact a separate business entity. The Act bears a similarity of legislative purpose previously crafted in the Construction Industry Fair Play Act (see our client alert dated July 14, 2010) to "crack-down" on the misclassification of employees, and furthers efforts by the NYS Department of Labor to narrowly restrict use by employers of workers designated as independent contractors.

Independent Contractor Test

A commercial goods transportation contractor can rebut the presumption of employment status if it can establish that the worker is an independent contractor. Adopting what is commonly referred to as the "ABC test," a worker qualifies as an independent contractor only if the individual meets *all* three of the following criteria:

- "The individual is free from control and direction in performing the job, both under his or her contract and in fact;
- The service must be performed outside of usual course of business for which the service is performed; and
- The individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the business at issue."[2]

Separate Business Entity Test

Alternatively, a commercial goods transportation contractor may also rebut the presumption of employment if it can establish a "separate business entity," which includes "any sole proprietor, partnership, corporation or entity." A person is considered a separate business entity from the commercial goods transportation contractor only if *all* of the following eleven criteria are satisfied:

"The business entity is 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 commercial goods transportation contractor for whom the service is provided to specify the desired result or federal rule or regulation;

- The business entity is not subject to cancellation or destruction upon severance of the relationship with the commercial goods transportation contractor;
- The business entity has a substantial investment of capital in the business entity, including but not limited to ordinary tools and equipment;
- The business entity owns or leases the capital goods and gains the profits and bears the losses of the business entity;
- The business entity has an option to make its services available to the general public or the business community on a continuing basis;
- The business entity includes services rendered on a Federal Income Tax Schedule as an independent business or profession;
- The business entity performs services for the commercial goods transportation contractor pursuant to a written contract, under the business entity's name, specifying their relationship to be as independent contractors or separate business entities;
- When the services being provided require a license or permit, the business entity pays for the license or permit in the business entity's name or, where permitted by law, pays for reasonable use of the commercial goods transportation contractor's license or permit;
- If necessary, the business entity hires its own employees, subject to applicable qualification requirements or federal or state laws, rules or regulations, pays the employees without reimbursement from the commercial good transportation contractor and reports the employees' income to the Internal Revenue Service;
- The commercial goods transportation contractor does not require that the business entity be represented as an employee of the commercial goods transportation contractor to its customers; and

The business entity has the right to perform similar services for others on whatever basis and whenever it chooses."[3]

Penalties

The Act imposes steep penalties on commercial goods transportation contractors who "willfully" fail to properly classify employees. A contractor "willfully violates" the Act when the contractor knew or should have known that he or she was committing a violation. The Act provides for civil penalties of up to $2,500 per misclassified employee for the first violation, and up to $5,000 for each subsequent misclassification within a five-year period. Additionally, the Act contains criminal penalties including imprisonment for not more than thirty days or a fine not to exceed $25,000 for the first violation, and imprisonment for not more than sixty days or a fine not to exceed $50,000 for each subsequent offense.

Notably, corporate officers, directors and shareholders who control at least ten percent of the corporation's stock can be personally liable under the Act when that individual knowingly permits the corporation to willfully misclassify employees. A conviction for a willful violation of the Act also can preclude the contractor or individual from bidding on public contracts for up to one year from the date of the conviction, or up to five years for subsequent convictions. Moreover, a commercial goods transportation contractor who misclassifies workers is subject to all applicable contributions, payments, and penalties under other statutes, including unemployment insurance, workers' compensation insurance, or business, corporate or personal income tax. In appropriate circumstances, penalties for misclassification may also be available under federal laws, including the Fair Labor Standards Act and the Affordable Care Act.

Other Relevant Provisions

Posting Requirement – Under the new law, every commercial goods transportation contractor and subcontractor must conspicuously post a notice[4] that describes the tax responsibilities of independent contractors, as well as employees' workers' compensation rights, unemployment benefits, minimum wage, overtime compensation, and other federal and state workplace laws, inclusive of a description of the Act's anti-retaliation provision and penalties. Additionally, the notice must contain contact information for filing a misclassification complaint. The New York State Department of Labor will issue a "model" notice on its website within thirty days of the Act's effective date. Failure to post the required notice may subject the contractor to a civil fine of up to $1,500 for the first violation, and up to $5,000 for each subsequent violation within a five-year period.

Enforcement – The Act's misclassification provisions do not establish a private right of action; rather, a driver who believes that he or she is misclassified must file a complaint with the Commissioner of the NYS Department of Labor. The Commissioner can impose civil penalties for violations of the Act. A contractor may appeal such penalties to the industrial board of appeals. If a worker is retaliated against in violation of the Act, however, the aggrieved employee may bring suit. Additionally, the new law specifies that nothing in the Act shall preclude misclassified workers from pursuing any other available legal remedies.

Anti-retaliation Provision – The Act contains expansive protection from retaliation. This provision contains a private right of action, as well as civil penalties.

Amendment to Unemployment Insurance Law and Workers' Compensation Law – The Act amends the New York unemployment insurance law and workers' compensation law to specifically include within the definition of an "employee" all workers employed by commercial goods transportation contractors who cannot overcome the presumption of employment.

Implications

New York commercial goods transportation contractors should familiarize themselves with the new law to ensure that all workers are properly classified by the Act's effective date, March 11, 2014. Both state and federal governments have significant monetary incentives to challenge worker classifications because overly-expansive independent contractor designations have resulted in significant shortfalls in employer contributions to Social Security, Medicare, unemployment insurance, and workers' compensation funds, as well as for state and local tax revenues. The Affordable Care Act (ACA) poses an additional liability risk, as the Act requires employers with fifty or more employees to provide employees with minimum essential health-care coverage. If an employer misclassifies workers, it risks running afoul of the ACA's mandates and may face additional penalties under the new ACA.

Given the potential for personal liability under the Act (including imprisonment) and the remedies associated with related federal and state statutes (which also include civil and criminal penalties), commercial goods transportation contractors should consult with their Proskauer attorney, or any of the lawyers listed herein, before designating drivers as independent contractors or separate business entities under the new Act.

[1] The Act amends the New York Labor Law by adding a new Article 25-C.

[2] N.Y.L.L. § 862-b(1).

[3] N.Y.L.L. § 862-b(2).

[4] An employer must provide the notice in English, Spanish, and any other language required by the Commissioner of Labor.

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