Fact SHEET

New York State Construction Industry FAIR PLAY ACT

The New York State Construction Industry Fair Play Act takes 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 **and**

(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 twelve criteria for separate business entity are listed 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 Commissioner of Labor will post the required notice on the department's web site within 30 days of the effective date of the law. 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 State Labor Department toll-free at 1-866-435-1499 or email us at:

dol.misclassified@labor.state.ny.us .

The full text of the Fair Play Act will also be posted 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; 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 twelve criteria to be considered a separate business entity.

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The New York State Department of Labor is an Equal Opportunity Employer/Program. Auxiliary aids and services are available upon request to individuals with disabilities.

New York State Department of Labor
Required Notice under Article 25-B of the Labor Law

ATTENTION ALL EMPLOYEES, CONTRACTORS AND SUBCONTRACTORS: YOU ARE COVERED BY THE CONSTRUCTION INDUSTRY FAIR PLAY ACT

The law says that you are an employee unless:

- You are free from direction and control in performing your job AND
- You perform work that is not part of the usual work done by the business that hired you AND
- You have an independently established business

Your employer cannot consider you to be an independent contractor unless all three of these facts apply to your work.

IT IS AGAINST THE LAW FOR AN EMPLOYER TO MISCLASSIFY EMPLOYEES AS INDEPENDENT CONTRACTORS OR PAY EMPLOYEES OFF-THE-BOOKS.

Employee rights. If you are an employee:

- You are entitled to state and federal worker protections such as
  - unemployment benefits, if unemployed through no fault of your own, able to work, and otherwise qualified
  - workers' compensation benefits for on-the-job injuries
  - payment for wages earned, minimum wage, and overtime (under certain conditions)
  - prevailing wages on public work projects
  - the provisions of the National Labor Relations Act and
  - a safe work environment
- It is a violation of this law for employers to retaliate against anyone who asserts their rights under the law. Retaliation subjects an employer to civil penalties, a private lawsuit or both.

Independent Contractors: If you are an independent contractor:

- You must pay all taxes required by New York State and Federal Law.

Penalties for paying off-the-books or improperly treating employees as independent contractors:

- **Civil Penalty** — First Offense: up to $2,500 per employee. Subsequent Offense(s): up to $5,000 per employee.
- **Criminal Penalty** — First Offense: Misdemeanor - up to 30 days in jail, up to a $25,000 fine and debarment from performing Public Work for up to one year. Subsequent Offense(s): Misdemeanor - up to 60 days in jail, up to a $50,000 fine and debarment from performing Public Work for up to 5 years.

If you have questions about your employment status or believe that your employer may have violated your rights and you want to file a complaint, call the Department of Labor at 1(866)435-1499 or send an email to dol.misclassified@labor.state.ny.us. All complaints of fraud and violations are taken seriously and you can remain anonymous.

Employer Name: _____