

# Construction Contractors Beware

*The Illinois Department of Labor Announces Plans to Aggressively Enforce Illinois' Employee Classification Act Against Contractors Misclassifying Workers as Independent Contractors*

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Illinois' Employee Classification Act (the "Act") was passed into law for the purpose of protecting workers who have been misclassified as independent contractors on construction related projects in Illinois. Regardless of whether the construction project is public or private, any contractor who misclassifies any worker faces substantial monetary fines, penalties and other actions that would ultimately prevent the contractor from performing public works projects in Illinois. More specifically, the Illinois Department of Labor ("IDOL") has wide latitude in assessing civil penalties and other remedies against any contractor doing business in Illinois for purposes of enforcing the Act.

**Essentially, the Act provides that individuals performing services for construction contractors on or after January 1, 2008 are presumed to be employees of that contractor unless they meet the criteria specified in Section 10 of the Act.** If a contractor has misclassified individuals as independent contractors, the IDOL may assess civil penalties and may seek other remedies provided for in the Act.

The Act establishes specific criteria to determine if an individual performing services for a construction contractor is an employee or an independent contractor. Under the law, an individual performing services for a contractor is presumed to be an employee unless:

- The individual is free from control or direction over the performance of the service for the contractor;
- The service performed is outside the usual course of services performed by the contractor; and
- The individual is engaged in an independently established trade, occupation, profession or business.

Also, a sole proprietor or partnership performing services for a contractor would not be considered an employee of the contractor as long as they can show that they are a legitimate subcontractor by meeting all 12 conditions specified in Section 10(c) of the Act.

Until recently, the IDOL has been relatively quiet with respect to pursuing formal legal action against alleged violators.

However, several contacts within the IDOL are now stating privately and publicly that efforts are underway to aggressively pursue alleged violators. **In other words, contractors who have yet to familiarize themselves with this new law - and continue to "subcontract" construction related work to individuals, sole proprietors and/or partnerships - are more likely to face severe legal and financial hardship in the days, weeks and months to come.**

**The stakes are huge.** A contractor that violates the Act will be subject to civil penalties up to \$1,500 for each violation found in the first audit by the IDOL, and up to \$2,500 for each repeat violation found by the IDOL within a five-year period. Each violation of the Act, for each person and for each day the violation continues shall constitute a separate and distinct violation. The civil penalties may be recovered in a civil action brought by the Director of Labor or a person aggrieved by a violation of the Act. For any second or subsequent violation determined by the IDOL within five years of a previous violation, the IDOL shall place the contractor on a debarment list and no state contract shall be awarded to the

contractor until four years have elapsed from the date of the last violation. In addition, any contractor who willfully violates the Act or obstructs the IDOL's enforcement efforts shall be subject to penalties up to double the statutory amount, punitive damages and criminal penalties specified in the Act. An individual whose rights have been violated under the Act is entitled to collect wages, salary, employment benefits or other compensation denied or lost due to the violation, plus an equal amount in liquidated damages. Individuals can also privately collect compensatory damages and up to \$500 for each violation, and in the case of unlawful retaliation, all legal and equitable relief, and attorney's fees and costs. It should be noted that a violation occurs for each individual misclassified and for each day that individual performed work, and criminal prosecution for willful misclassification is also possible. Again, the stakes are serious and the consequences severe.

Contractors of all backgrounds should use extreme care and caution when engaging any subcontractor for services on a construction project in Illinois (private or public). Efforts by the IDOL to better enforce and administer the law are well underway. Any contractor not completely familiar with this new law yet continues to subcontract work to individual contractors (including sole proprietorships and/or partnerships) risks substantial legal exposure.

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