

Construction Industry Fair Play Act Becomes Law

Pursuant to a 2007 Task Force report that found substantial misclassification of employees and independent contractors among construction contractors, Governor Paterson signed into law the Fair Play Act, which became effective October 26, 2010. This change to Article 25 of the Labor Law is likely to have the effect of eliminating many independent contractors by imposing a highly restrictive definition of “independent contractor” status, together with a “presumption” of employment. The Act also imposes stiff corporate and personal liability and criminal penalties for willful misclassification.

The “presumption of employment in the construction industry” (Sec. 861-c) states that “any person performing services for a contractor shall be classified as an employee unless the person is a separate business entity,” as defined in the Act, or unless three prescribed criteria are met, “in which case the individual shall be an independent contractor.” Those criteria are referred to as the ABC test: (A) the individual is free from control and direction in performing the job, both under his 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.

The Act will also require construction industry contractors to post at their worksites information concerning employees’ rights to workers’ compensation coverage, unemployment insurance, minimum wage, overtime, and other workplace protections. Contractors will also have to post information about penalties and noncompliance with the Fair Play Act, the rights of employees to be free from retaliation if they exercise rights under the Act, and government contact information to file complaints.

NYSEC has heard that DOL is checking job sites to monitor posting requirements and that electrical contractors have already been cited. **Protect yourself:** Follow this DOL link <http://www.labor.ny.gov/sites/legal/laws/construction-industry-fair-play-act.page> to download a copy of the Fair Play Act poster and for additional guidance.