

Management Alert



New Amendments to the Illinois Employee Classification Act

On January 23, 2013, Illinois Governor Quinn signed two bills that will amend the Illinois Classification Act, effective January 1, 2014. The Illinois Classification Act is directed at preventing the misclassification of employees as independent contractors in the construction industry and applies to construction projects performed within the State of Illinois. One of the two amendments, Public Act 098-0105 (“PA-105”), imposes reporting requirements on companies concerning the identification of, and amounts paid to, individuals and organizations treated as non-employees. The other amendment, Public Act 098-0106 (“PA-106”), principally provides for administrative procedural safeguards, reduces the amount of penalties that can be imposed and provides for individual liability of officers or agents of a corporation who “knowingly permit” the employer to violate the provisions of the Act.

The Illinois Employee Classification Act

Effective January 1, 2008, Illinois enacted the Employee Classification Act. Directed at the Construction Industry, the Act imposes substantial penalties for the misclassification of employees as independent contractors with respect to construction projects performed within the State of Illinois. The Act creates a presumption that any person performing services for an applicable construction company is an employee of that company unless it is shown that the individual is an independent contractor under one of two alternative tests. Neither of these tests creates a bright-line distinction between what constitutes an employee or an independent contractor.

The Act provides for a fine of up to \$1500 for each violation found in the first audit by the Illinois Department of Labor, and a fine not to exceed \$2500 for each repeat violation found by the Department within a five year period. A separate violation exists for each day that any individual is misclassified as an independent contractor. Thus, the total amount of any fine can add up quickly. Also, any entity or employer that willfully violates the Act commits a Class C misdemeanor, and an entity or employer that commits a subsequent violation within a 5-year period commits a Class 4 felony. Two violations within any 5-year period also subjects the company to debarment from performing any state contracts. In addition to enforcement by the Department of Labor, the Act also provides for a private right of action for any person aggrieved by a violation of the Act.

New Reporting Requirements – PA-105

PA-105 creates a new provision of the Act requiring construction companies, for each taxable year, to report the following information with respect to any individual, sole proprietor or partnership to whom the company makes payments for construction services if the recipient of the payment is not classified as an employee: (1) the name, address and business identification number for the construction company; (2) the name, address and federal employer identification number for the recipient of the payment; (3) the total amount paid during the taxable year to the recipient, including payments for any materials and equipment that were provided along with the services. Only the name of the construction company and the name of the recipient of the payments are subject to disclosure under the Freedom of Information Act. Failure to report, or filing an incomplete report, subjects the company to the same fines and debarment consequences provided for other

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violations of the Act. Businesses primarily engaged in the sale of tangible personal property or contractors doing work for such businesses are not subject to the reporting requirements. Also, the reporting requirements do not apply to individuals or firms meeting the “responsible bidder” requirements of Section 30-22 of the Illinois Procurement Code.

Procedural Amendments, Reduction of Fines, Individual Liability – PA-106

The procedural amendments contained in PA-106 appear to be designed to ensure that the hearing requirements of the Illinois Administrative Procedure Act are satisfied. The amendments also require the Illinois Department of Labor to provide notice to the alleged employer within 120 days of the filing of any complaint with the Department. Each of the fines for violations of the Act are reduced by \$500 – \$1500 to \$1000 for first violations and \$2500 to \$2000 for additional violations within a five-year period. Also, PA-106 provides for individual liability to “any officer of a corporation or agent of a corporation who knowingly permits such employer to violate the provisions of the Act.” However, individual liability does not apply to an officer or agent of a corporation “which on the project under investigation satisfies the responsible bidder requirements set forth in the Illinois Procurement Code.”

Implications for Employers

While PA-105 provides another administrative burden for construction employers, regulations promulgated under the Act already require employers to keep records of the information that must be filed. But employers must be diligent about filing complete and accurate reports to avoid being subjected to the penalties imposed.

The most significant change created by PA-106 is the imposition of individual liability. While the \$500 penalty reductions are a help, the real problem for construction companies arises out of the fact that each day that a misclassified worker performs services amounts to a separate violation. Thus, the exposure for penalties can add up quickly even with the reduced fines. Also, although the procedural enhancements for construction companies provide helpful clarification, compliance with the procedural safeguards of the Illinois Administrative Procedure Act has already substantially been imposed by case law resolving due process challenges to the Act.

The imposition of individual liability raises the stakes higher even when attempts to comply with the Act have been conducted in good faith. As stated above, neither of the two alternative tests creates a bright line distinction between an employee and an independent contractor. Thus, employers should document and maintain records of their good faith efforts to comply with the Act to create evidence that any violation of the Act that is found is not deemed to be “knowing.”

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