

# Maryland Gets Tough On Classification Of Workers As “Independent Contractors”

By Michael Schrier and Joel Rubinstein

The State of Maryland is cracking down on what it perceives to be a problem with construction or landscaping contractors and subcontractors misclassifying workers as “independent contractors” instead of as “employees.” Maryland’s new enforcement mechanisms have the potential to impose significant penalties for misclassification. As a result of these new enforcement schemes, all construction companies with workers located in Maryland and who are classified as “independent contractors” should carefully review such classifications for compliance with new statutory and enforcement regimes to make sure such workers have not been inadvertently misclassified.

On May 7, 2009, Maryland Governor Martin O’Malley signed the Workplace Fraud Act of 2009 (“WFA”). The WFA, which becomes effective October 1, 2009, expressly covers only the construction or landscaping industries in Maryland. The WFA presumes that all work performed by an individual for pay creates an employee-employer relationship, unless the individual is an “exempt person” or other limited statutory exemptions apply. The burden is on the employer to establish that the individual is an “exempt person”, meaning that person: (i) performs services in a personal capacity; (ii) performs services free from direction and control over the means and manner of providing the services; (iii) furnishes the tools and equipment necessary to provide the service; (iv) operates a business that is considered inseparable from the individual for purposes of taxes, profits, and liabilities; (v) exercises complete control over the management and operation of the business; and (vi) exercises the right to perform the services of the business for multiple entities at the individual’s sole choice and discretion. Alternatively, the employer must demonstrate that: (i) the individual who performs the work is free from control and direction; (ii) the individual customarily is engaged in an independent business of the same nature as that involved in the work; and (iii) the work is outside the usual course of business of the employer or the work is performed outside of the employer’s place of business. Pursuant to the WFA, “[a]n employer may not fail to properly classify an individual who performs work for remuneration paid by the employer” and “[a]n employer may not knowingly fail to properly classify an individual who performs work for remuneration paid by the employer.”

The WFA creates new administrative enforcement mechanisms to ensure compliance. Only some of those mechanisms are outlined in this article. New record-keeping requirements are created, requiring contractors to maintain records (for at least three years) regarding (i) the name, address, occupation, and classification of each employee or independent contractor; (ii) the rate of pay of each employee or method of payment for each independent contractor; (iii) the amount paid each pay period; (iv) the hours that each employee or independent contractor worked each day and each workweek; and (v), for each independent contractor, evidence that such person is an exempt person or a properly classified independent contractor. The Commissioner of Labor and Industry is granted the power to enter an employer’s office or work site to review records, interview workers, observe work being performed, and issue subpoenas to obtain records or testimony. Employers can be compelled to produce records relevant to the classification of workers and the State can impose fines of up to \$500 per day if such records are not produced.

If, after notice and hearing, the Commissioner of Labor and Industry determines that an employer misclassified a worker or knowingly misclassified an employee, several penalties and remedies must be imposed. Employers with knowing misclassifications are eligible for more severe penalties than employers who made inadvertent misclassifications. Among the various penalties and remedies are: First, the employer will be required to pay restitution to the misclassified workers, and possibly an additional amount equal to three times the restitution. Second, the employer must come into compliance with all applicable labor laws “including those related to income tax withholding, unemployment insurance, wage laws and workers’ compensation.” Third, civil penalties of up to \$5,000 may be imposed for each employee improperly classified. And finally, the Commissioner is required to notify the Comptroller, Office of Unemployment Insurance, the Insurance Administration, and the Worker’s Compensation Commission of the violation to enable such agencies to begin their own enforcement proceedings against the employer. The WFA makes it clear that “an employer may be ordered to make restitution, pay any interest due, and otherwise comply with all applicable laws and regulation by multiple final orders of a court and all relevant administrative units, including the Comptroller, the Office of Unemployment Insurance, the Insurance Administration, and the Workers’ Compensation Commission.” In other words, it is possible for a construction company to be penalized by several state administrative agencies and under different statutes for the same underlying act of misclassification.

To the extent a contractor is performing work on State or local government projects, the Commissioner is also required to inform such “public body” of the Commissioner’s decision to issue a citation to any construction or landscape company. As a result, the public body is required, in a manner akin to the federal Davis-Bacon Act, to withhold from payment under the public contract an amount sufficient to pay restitution, benefits, taxes, or other contributions to or on behalf of affected misclassified employees.

In addition to the foregoing administrative remedies, the WFA creates two additional protections for workers. First, the WFA prohibits discrimination or retaliation against workers who file complaints alleging violations of the WFA. Second, the WFA creates a private cause of action authorizing allegedly improperly classified employees to file lawsuits against employers. Successful plaintiffs in WFA cases may be awarded “economic damages”, treble damages (in the case of knowing misclassifications), and attorney’s fees and costs.

While the WFA expressly targets the construction and landscaping industries, a recent Executive Order by Governor O’Malley attempts to expand enforcement of worker classifications far beyond those industries. Executive Order 01.01.2009.09 signed on July 14, 2009, creates a “Joint Enforcement Task Force on Workplace Fraud.” The Task Force is comprised of representatives from the Secretary of Labor, the Maryland Attorney General, the Comptroller, the Workers’ Compensation Commission, the Insurance Commissioner, and the Commissioner of Labor and Industry. The Task Force’s mission is to “coordinate the investigation and enforcement of workplace fraud” by sharing information and forming “joint enforcement teams to utilize the collective investigative and enforcement capabilities of the Task Force members.” The Task Force is also tasked with identifying and investigating “those industries in which misclassification is most common.” Hence, it appears that the Task Force is designed to reach far beyond the construction and landscaping industries and to target any Maryland employer that

misclassifies workers as “independent contractors” instead of as “employees” under state laws other than the WFA.

Given these clear and unmistakable signals from Maryland that it intends to vigorously enforce old and new worker classification laws, construction and landscaping companies with workers located in Maryland should carefully reevaluate the classification of all workers who are currently classified as “independent contractors.” Employers should make sure each “independent contractor” classification can withstand the rigorous requirements of the WFA and various other state (and federal) laws concerning classification of workers.

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