

CLIENT ALERT

September 2010

Employee or Independent Contractor?

**Contractors Must Properly Classify Workers or
Face Penalties and Civil Liability**

The first-known private litigation has been filed under a New Jersey statute aimed at the misclassification of undocumented workers as independent contractors to avoid paying taxes and employee benefits. In N.J. Reg'l Council of Carpenters et al. v. D.R. Horton, Inc., et al., Civil Action No. 2:08-cv-01731, a carpenters' union has brought a class action lawsuit against homebuilder D.R. Horton, alleging, among other claims, that the construction giant violated the 2007 Construction Industry Independent Contractor Act ("CIICA"). The matter is pending in federal court on diversity jurisdiction.

Similar to New Jersey's unemployment and wage payment laws, under the CIICA, individuals hired to perform services in the making of improvements to real property for remuneration are deemed "employees" and engaged in an employer-employee relationship with the hiring entity, unless the hiring entity can demonstrate that: (1) the individual has been and will continue to be free from control or direction over the performance of that service; (2) the service is either outside the usual course of the business for which the service is performed, or is performed outside of all the places of business of the employer for which the service is performed; and (3) the individual is customarily engaged in an independently established trade, occupation, profession, or business.

The CIICA imposes criminal and civil penalties on employers who misclassify employees as independent contractors, and creates a private cause of action for allegedly displaced workers to recover damages, including back pay, attorneys' fees, and costs of suit.

Statutory penalties for the misclassification of an employee as an independent contractor can be significant. An employer who misclassifies a worker may be fined up to \$1,000 or imprisoned up to 90 days, or both. Additionally, each week in which an employee is misclassified, even for one day, constitutes a separate offense for each misclassified employee. More severe penalties can be imposed if the misclassification was done “knowingly” and can include a maximum fine of \$150,000 and up to 10 years imprisonment. The CIICA also authorizes the Commissioner of Labor and Workforce Development to assess and collect from the employer administrative penalties of up to \$2,500 for a first violation and up to \$5,000 for each subsequent violation. Knowing violations can result in the employer’s placement on a list of employers prohibited from working on public work projects for three years. The Commissioner can also order immediate suspension of a contractor’s registration, issue stop-work orders for repeat offenders, and assess civil penalties.

As the CIICA provides for a private cause of action, employers can face actions for damages, including attorneys’ fees, by employees or their representatives, including labor organizations. The CIICA also contains an anti-retaliation provision, creating a rebuttable presumption of unlawful retaliation where an employer takes an adverse action against a worker within 90 days of the worker’s exercise of his rights under the CIICA.

Employee or Independent Contractor?

To determine whether a worker is an employee or an independent contractor, contractors must assess the following issues regarding their degree of control over the worker: (1) behavioral control; (2) financial control; and (3) the type of relationship. If the business has a right to direct and control how the worker performs his/her work (“behavioral control”), including the time, location, and method of the work, the worker is more likely to be an employee than an independent contractor. If the worker has financial investment in his/her tools or equipment, is paid by the job rather than by the hour, or has the ability to realize a profit or a loss on his/her work, the worker has financial control over his/her work, and is more likely to be an independent contractor. Finally, the way the parties define the relationship can influence whether the worker is an employee or an independent contractor.

Contractors should be aware, however, that the name they assign the relationship is not outcome-determinative, and factors such as whether the business provides the worker employee-type benefits, whether the business and the worker expect their relationship to continue indefinitely, and the extent to which the services performed by the worker are a key aspect of the regular business of the company or are similar to services performed by employees weigh heavily in the analysis. No single factor controls the analysis.

What Can Contractors Do to Ensure Compliance?

Now that the first private action under the CIICA has been filed, more may follow. It is no longer enough for contractors to review compensation policies. Construction employers must take proactive steps to ensure that workers are properly classified as either employees or independent contractors. Violations can arise from well-intentioned, but misinformed managers and non-compliant employees. Given the heightened focus on misclassification violations in the construction industry, contractors should ensure that their pay practices and policies are in complete compliance with the FLSA as well as the New Jersey wage and hour laws. Further, contractors are strongly encouraged to carefully analyze each new hire's job duties to determine if he/she can properly be classified as an independent contractor, and should also conduct a self-audit to ensure that all current workers are properly classified.

Our team of Labor & Employment attorneys can assist your organization in conducting a self-audit of your policies, procedures and worker classifications to safeguard against misclassifying employees as independent contractors. For more information on CIICA compliance, please contact a partner in our Labor & Employment Law Practice Group: Tricia B. O'Reilly, Esq., Peter J. Pizzi, Esq., M. Trevor Lyons, Esq., or Michael A. Shadiack, Esq. at (973) 535-0500.