

Have Independent Contractors on Your Jobsite?

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If you operate a construction business in Pennsylvania, and hire independent contractors, who you pay via 1099s, you could face criminal charges, and be forced to pay fines and restitution if these workers are not properly classified as independent contractors. You could also be ordered to pay Workers' Compensation benefits – including medical and wage loss benefits – direct to an individual who you thought of, and treated as, an independent contractor.

Pennsylvania's Construction Workplace Misclassification Act ("CWMA") has been in place for ten years. Contractors who look to hire independent workers should be mindful of the fact that the CWMA was enacted specifically for the purpose of cracking down on the common practice of contractors "having no employees" – designating everyone on a job site as an independent contractor – in order to avoid all the costs, burdens and other legal implications hiring actual employees, including payroll tax, UC, and Workers' Compensation coverage. The CWMA applies to any/all forms of construction jobs, in residential as well as commercial and industrial job sites. It applies a broad definition of "construction" to include "[e]rection, reconstruction, demolition, alteration, modification, custom fabrication, building, assembling, site preparation and repair work done on any real property or premises under contract, whether or not the work is for a public body and paid for from public funds." 43 P.S. § 933.2.

The CWMA requires that, in order to qualify as independent contractors, workers on your job site must:

- Have a written contract to perform such services;
- Be free from control or direction over the performance of services; and
- The individual must be customarily engaged in an independently established trade, occupation, profession or business.

While the first factor is relatively straightforward, the other two require further analysis. The PA Dept. of Labor and Industry provides the following factors and guidance to determine qualification on the "right to control" and "trade/business/profession" issues:

- The individual possesses the essential tools, equipment and other assets necessary to perform the services independent of the person for whom the services are performed.
- The individual's arrangement with the person for whom the services are performed is such that the individual shall realize a profit or suffer a loss as a result of performing the services.
- The individual performs the services through a business in which the individual has a proprietary interest.
- The individual maintains a business location that is separate from the location of the person for whom the services are being performed.
- The individual previously performed the same or similar services for another person. under the above requirements, or holds himself out to other persons as available and able to perform the same or similar services.
- The individual maintains liability insurance during the term of this contract of at least \$50,000.

It should be noted that the factors listed above are not collective – but rather are combined to analyze the question of whether a worker is truly independent, and not an employee. In other words, answering "no" to any of the above (such as failure to carry liability insurance) does not necessarily end the analysis, but could sway a state or federal investigator, Workers' Comp Judge, or Unemployment Comp Referee, to trigger a designation that a worker is in fact an employee.

When the CMWA was enacted in 2011, the criminal enforcement angle of the law had not been established. Over the past ten years however, criminal investigations by the Department of Labor and Industry are increasing – with now 28 investigators working full time. In 2020, 64 contractors were charged with violations of the CMWA, with combined fines of nearly \$325,000. Due to COVID, 2020 was a “down year” for investigations and enforcement. From 2016 to 2019, there were over 500 investigations completed. As the construction industry comes through the pandemic, into 2022 and beyond, meeting consumer demands for services will have to be counter-balanced with compliance concerns regarding these independent workers.

PA Attorney General Josh Shapiro is currently following-through on an initiative to impose criminal penalties on contractors who violate the CMWA...these criminal penalties include hefty fines and restitution. Criminal charges can be triggered regardless of whether a worksite injury has occurred, or an “independent contractor” seeks UC recovery after a job ends. In a recent press conference on this topic, Attorney General Shapiro referred to worker misclassification as “stealing,” and indicated that “...prosecutions [will] send a clear message – misclassification will have real consequences in Pennsylvania. We cannot tolerate business practices that ignore the legal requirements for contractors, and engage in this kind of theft here in the Commonwealth.” This press conference came on the heels of an investigation in Delaware County – that resulted in hefty fines and restitution against a contractor who illegally utilized a group of “drywall contractors” to help build a national chain fitness center location.

If you hire independent contractors in the construction industry, please call Ken Scholtz (412) 594-3903, if you have questions regarding the CMWA.