

## **NEW YORK IMPOSES NEW INDEPENDENT CONTRACTOR TEST FOR COMMERCIAL GOODS TRANSPORTERS, INCLUDING FACTORY-BUILT HOUSING TRANSPORTERS**

Modeled after other recent enactments targeting independent contractor misclassification, the New York State Commercial Goods Transportation Industry Fair Play Act (the "Act") was signed by the Governor in late 2013, and went into effect on April 10, 2014. The Act creates a new standard for determining whether a driver of commercial vehicles is an employee or an independent contractor. The Act amends the Labor Law to establish a presumption that such drivers are employees unless the contractor can show that the transporter is a "separate business entity," or the individual meets all three prongs of the so called "ABC Test." If a driver is deemed to be an employee, the employer is required to provide workers compensation coverage and other employment benefits, pay payroll taxes, and make withholdings for income taxes and deductions for social security. The penalties for contractors or business owners who pay workers off the books or misclassify employees as independent contractors are severe; violations of the Act can bring civil and criminal fines and penalties, including exclusion from state contracts and imprisonment. Thus, it is important to review the following information and ensure that drivers are properly classified.

### **Who is covered by the Act?**

The Act covers both drivers and contractors that engage in commercial goods transportation services, as defined in the Act. Any driver, who possesses a state-issued driver's license to transport goods for compensation in the state of New York, and operates a commercial motor vehicle with a gross vehicle weight rating of over 10,000 pounds, engages in commercial goods transportation services. Any contractor or subcontractor, regardless of business entity designation, that retains the services of a commercial goods transportation driver is also subject to the provisions of the Act.

### **Independent Contractor Determination**

The Act states that any person who is engaged in commercial goods transportation services is presumed to be an employee of the company that hired them, unless payment for the transportation services is reported on a federal income tax form 1099, if required by law, and the independent contractor can meet either the three-part "independent contractor test" or the eleven-part "separate business entity test."

#### **1) Independent Contractor Test**

The independent contractor test, or ABC Test, applies when the driver being retained is an individual. If the driver meets the following three factors, the individual shall be deemed an independent contractor, and not an employee:

- A) the individual driver is free from control and direction in performing the job, both under contract and in fact;
- B) the service is performed outside the usual course of business of the hiring company; AND
- C) the individual is customarily engaged in an independent trade, occupation, profession, or business that is similar to the transportation services issued.

## 2) Separate Business Entity Test

The Act provides that a transporter will still be presumed to be an employee, even if the services are being provided through a business entity. For the entity to be deemed an independent contractor, it must be a "separate business entity." To qualify as a separate business entity, the following eleven factors must be present:

- A) The business entity is free from direction or control over the means and manner of providing the service to the entity that contracts for the shipping services;
- B) The business entity is not subject to cancellation or destruction upon the end of the transportation relationship;
- C) The business entity has substantial investment of capital in the business entity;
- D) The business entity owns or leases the capital goods, gains the profits and bears the losses;
- E) The business entity may make its services available to the general public;
- F) The business entity provides services reported on a Federal Income Tax Form 1099, if required by law;
- G) The business entity performs services for the company that is contracting for the shipping services under a written contract that specifies the relationship as one of independent contractors or separate business entities;
- H) The business entity pays for required licenses or permits, where required;
- I) The business entity hires its own employees without contractor approval and pays the employees without reimbursement from the contractor;
- J) The contractor does not require the business entity to be represented as an employee of the contractor; AND
- K) The business entity has the right to perform similar services for others.

When a business entity meets the above eleven-part test, that entity will be considered a separate commercial goods transportation contractor, and the company paying for the shipping services will not be deemed to be the employer of the contractor. The separate business entity, however, will be subject to all of the provisions of the Act including the presumption of employee status for that entity's drivers.

### **Commercial Goods Transportation Contractors Must Post Notice**

The Act requires that each commercial goods transportation contractor post, in a prominent and accessible place on-site, a notice provided by the Department of Labor Commissioner. As of April, all such contractors should be complying with this posting requirement. The notice is available at <http://www.labor.ny.gov/formsdocs/ui/IA998.pdf>. Failure to post the required notice may result in civil penalties up to \$1,500 for a first violation and up to \$5,000 for each subsequent violation within a five-year period.



## **Penalties for Violations of the Act**

A commercial goods transportation contractor who willfully fails to classify an individual as an employee may be subject to civil and criminal penalties. Civil penalties may be imposed by the Commissioner of the Department of Labor, the Chair of the Workers' Compensation Board, or the Commissioner of Taxation and Finance, depending on which law was violated, however, no more than one civil penalty per employee per incident may be imposed. A willful violation occurs when the contractor knew or should have known that its conduct was prohibited. Generally, such civil penalties may be as much as \$2,500 for a first violation and up to \$5,000 for each subsequent violation within a five-year period. Violators of the Act are also subject to a criminal penalty of misdemeanor charges and, upon conviction of a first offense, imprisonment for up to 30 days and a fine not to exceed \$25,000, and upon conviction of a second offense, imprisonment for up to 60 days and a fine not to exceed \$50,000. Moreover, any commercial goods transportation contractor and any officer or shareholder who owns at least 10% of the outstanding stock of a corporation that has been convicted of a misdemeanor becomes ineligible to submit a bid or be awarded any public works contract with the State of New York or municipal bodies for a period of up to one year following conviction, or five years in the event of a subsequent violation. If the contractor is a corporation, any officer of the corporation or shareholder who owns or controls at least 10% of the outstanding stock of the corporation, who knowingly permits the corporation to willfully violate the Act, may be held in violation and subject to the civil and criminal penalties.

## **Retaliation Prohibited**

The Act provides protection for any person who makes or threatens to make a complaint that rights under the Act have been violated, or who participates in an investigation, hearing or inquiry into any such violation. Retaliation by an employer will subject the actor to a civil penalty of up to \$2,500 for a first violation and up to \$5,000 for each subsequent violation within a five-year period.

## **CONCLUSION**

Although the provisions of the Act are fairly straight forward, due to the nature of the work that is being regulated, a transportation contractor may easily be non-compliant. It is important to be aware of all of the relevant provisions to ensure strict compliance. Failure to do so may result in imposition of draconian penalties.