

# PENNSYLVANIA CONSTRUCTION WORKPLACE MISCLASSIFICATION ACT COMPLIANCE

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In October 2010 Pennsylvania Gov. Ed Rendell signed into law Pennsylvania's new Construction Workplace Misclassification Act (CWMA), which places new regulations on construction companies operating in Pennsylvania and further delineates the difference between an independent contractor and an employee.

Under the new law, construction companies may only classify a worker as an independent contractor if the individual:

- Has a written contract to perform the services;

- Does not direct or have control over the performance of such services, both under the contract and in fact; and

- Is customarily engaged in an independently established trade, occupation, profession or business with respect to the services to be performed. To establish this third prong, this means that an independent contractor must:

  - Possess the necessary tools or equipment to perform the services;

  - Perform the services through a business in which he or she has an ownership interest;

  - Have an arrangement whereby he or she may enjoy a profit or suffer a loss by rendering such services;

  - Maintain a separate business location;

  - Have performed the same or similar services previously for another person or holds themselves out to other persons as available and able to perform services;

  - Maintain at least \$50,000 in liability insurance over the term of the contract.

After Feb. 10, 2011, any independent contractor not meeting these specifications must be reclassified as an employee. The CWMA also makes it clear that the failure to withhold federal or state income taxes, or pay unemployment compensation or workers compensation premiums, will not be considered in the determination of whether or not an individual is an independent contractor.

Pennsylvania construction companies must be in compliance with Pennsylvania's new Construction Workplace Misclassification Act (CWMA) by Feb. 10, 2011 or face penalties that may include both monetary fines and jail sentences.

An employer, officer or agent of an employer may be subject to these penalties if they intentionally misclassify employees as independent contractors. Those penalties for an intentional misclassification which constitutes a criminal misdemeanor can include up to

12 months imprisonment and fines.

A penalty of not more than \$1,000 can be assessed for a negligent misclassification which constitutes a summary offense.

Further, the Pennsylvania Department of Labor & Industry (DLI) can assess civil fines of up to a \$1,000 fine for the first offense and up to \$2,500 for each additional violation. Each misclassified worker is to be considered a separate offense. This can add up. Moreover, the DLI can issue a cease-work court order requiring the company to stop work within 24 hours until the misclassification is corrected.

Under this Act, it will also be a criminal offense in Pennsylvania to contract with a subcontractor who engages in misclassifying employees.

Penalties may not be imposed if the employer of the services believed, in good faith, that the employee qualified as an independent contractor at the time the services were performed.

The CWMA has imposed a broad definition on "construction" to include erection, reconstruction, demolition, alteration, modification, custom fabrication, building, assembling, site preparation and repair work done under contract on any real property or premises. The law applies to both privately and publicly funded construction work.

The new law also includes a whistleblower protection clause that prohibits retaliation against anyone filing a complaint or reporting a violation in good faith.

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#### About Beth Lincow Cole

Employment Law Attorney Beth Lincow Cole has skillfully helped business owners and managers head off the unwanted and unnecessary lawsuits that can arise in the workplace. Drawing on her successful legal experiences both in and outside the courtroom, Beth Lincow Cole understands how to protect employers. By developing solid pre- and post-employment procedures for her clients, she assures that they are legally protected.

Beth Lincow Cole has worked for large regional and national law firms, focusing solely on employment issues, on behalf of management within a wide range of industries. Whether you are a start up company with basic questions about personnel files or a larger company with questions about an employee's Family Medical Leave, Beth Lincow Cole can help. Drawing on her experiences, she counsel's companies in the following practice areas:

- Defense in administrative agency matters such as before the DOL, EEOC, PHRC or NJDCR
- Department of Labor Audits
- Discrimination
- Downsizing/Reduction in Force
- Drug Testing
- Employment Contracts and Severance Agreements
- Employment Law Compliance

- FMLA and other family leave laws
- Independent Contractors/Contingent Workforce

Please contact the firm to find out how the Law Office of Beth Lincow Cole can protect your company.