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New York State Passes Worker Misclassification Law for Commercial Transportation Industry

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On January 10, 2014, New York Governor Andrew Cuomo signed into law the New York State Commercial Goods Transportation Industry Fair Play Act (the Act), which becomes effective on March 11, 2014. As with the Construction Industry Fair Play Act enacted in 2010 and the more recent partnership between the U.S. Department of Labor and New York State Department of Labor to combat worker misclassification, the Act signifies yet another major effort undertaken by New York State to combat employee misclassification. Under the new Article 25-C to the New York Labor Law, the Act creates a presumption of employee status for any individual who performs commercial goods transportation services for a commercial goods transportation contractor, unless the worker meets specific criteria to warrant consideration as an independent contractor or separate business entity. The Act further amends the Unemployment Insurance Law and Workers' Compensation Law to specifically include workers engaged by commercial transportation contractors unless they overcome the presumption of employment under the Act.

The Act requires a commercial transportation worker to meet all of the following three criteria to be considered an independent contractor:

- The individual is free from control and direction in performing the job, both under his or her contract and in fact;
- The service must be performed outside of the usual course of business for which the service is performed; and
- The individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the business at issue.

N.Y. Labor Law § 862-b(1). Alternatively, for purposes of rebutting the presumption of employee status, a worker can be considered a "separate business entity" if he or she meets *all* of the following 11 criteria:

- The business entity is performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of the commercial goods transportation contractor for whom the service is provided to specify the desired result or federal rule or regulation;

- The business entity is not subject to cancellation or destruction upon severance of the relationship with the commercial goods transportation contractor;
- The business entity has a substantial investment of capital in the business entity, including but not limited to ordinary tools and equipment;
- The business entity owns or leases the capital goods and gains the profits and bears the losses of the business entity;
- The business entity has an option to make its services available to the general public or the business community on a continuing basis;
- The business entity includes services rendered on a Federal Income Tax Schedule as an independent business or profession;
- The business entity performs services for the commercial goods transportation contractor pursuant to a written contract, under the business entity's name, specifying their relationship to be as independent contractors or separate business entities;
- When the services being provided require a license or permit, the business entity pays for the license or permit in the business entity's name or, where permitted by law, pays for reasonable use of the commercial goods transportation contractor's license or permit;
- If necessary, the business entity hires its own employees, subject to applicable qualification requirements or federal or state laws, rules or regulations, pays the employees without reimbursement from the commercial good transportation contractor and reports the employees' income to the Internal Revenue Service;
- The commercial goods transportation contractor does not require that the business entity be represented as an employee of the commercial goods transportation contractor to its customers; and
- The business entity has the right to perform similar services for others on whatever basis and whenever it chooses.

New York Labor Law § 862-b(2).

Similar to the Construction Industry Fair Play Act, the Act requires commercial goods transportation contractors and subcontractors to conspicuously and prominently post a "Know Your Rights Notice" (to be published by the Commissioner of Labor of New York). First time violations of this requirement are subject to a civil penalty of $1,500, and up to $5,000 for each subsequent violation within a five-year period.

The Act also imposes severe civil and criminal fines and penalties against commercial goods transportation contractors that are found to have "willfully" violated the Act by misclassifying employees. A commercial goods transportation contractor found to have willfully violated the Act is subject to a fine up to $2,500 per misclassified employee for the first violation, and up to $5,000 for each subsequent misclassification within a five-year period. Criminal penalties under the Act include imprisonment for not more than 60 days

or a fine up to $50,000. The Act also imposes personal liability against corporate officers, directors, and shareholders (who control at least 10 percent of the corporation's stock) for willful misclassification of employees. A commercial goods transportation contractor found to have willfully violated the Act may also be debarred from bidding on or performing public contracts.

In light of New York State's heightened effort to combat employee misclassification and the severe penalties imposed by the Act, commercial goods transportation contractors can ill afford to take the Act's requirements lightly. Because the Act will go into effect on March 11, 2014, motor carriers with operations in New York State should familiarize themselves with the Act, and review their existing practices and operations to ensure compliance with the Act. Contractors should also review any agreements with owner-operators of commercial motor vehicles.

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