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THE NEW YORK STATE COMMERCIAL GOODS TRANSPORTATION INDUSTRY FAIR PLAY ACT

On March 17, 2014, Governor Cuomo signed a bill that made “technical corrections” to the New York State Commercial Goods Transportation Industry Fair Play Act (the “Fair Play Act”). The Fair Play Act, which will go into effect on April 10, 2014, limits the scope and number of workers delivering commercial goods in the State that may be classified as “independent contractors” or “separate business entities” as opposed to “employees.” Below is the summary of this new and significant legislation.

Key Statutory Definitions

The Fair Play Act creates a statutory presumption that any person performing “commercial goods transportation services” for a “commercial goods transportation contractor” is an “employee” unless one of two statutory tests are satisfied. The statutory definitions of the relevant terms are important to understand.

The Fair Play Act defines “commercial goods transportation services” as “the transportation of goods for compensation by a driver who possesses “a state-issued” driver’s license, transports goods in the state of New York, and operates a commercial motor vehicle [with a gross vehicle weight rating or gross combination rate of more than 10,000 pounds].”

Additionally, under the Fair Play Act, a “commercial goods transportation contractor” is defined as “any sole proprietor, partnership, firm, corporation, limited liability company, association, or other legal entity” that compensates drivers with a State license who are operating a qualifying commercial motor vehicle that is transporting commercial goods in this state. The Fair Play Act further expressly confirms that a “commercial goods transportation contractor” specifically “includes a general commercial goods transportation contractor or a commercial goods transportation subcontractor.”

Rebutting the Presumption: The Two Tests

In essence, the Fair Play Act amends New York’s Labor Law by creating a “rebuttable presumption” that any driver/provider of “commercial goods transportation services” for a commercial goods transportation contractor must be classified as an “employee” unless compensation is reportable on a Federal Income Tax Form 1099 and the driver/provider entity can satisfy one of the two statutory tests. To rebut the statutory presumption, every requirement of at least one of two statutory tests must be satisfied.

(a) The Three Part Test

The first test requires that an entity classifying a driver/provider as an “independent contractor” establish that:

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

Thus, under this test a business that provides the transportation of commercial goods as part of its regular course of business cannot satisfy this second requirement.

(b) The “Separate Business Entity” Test

Alternatively, under the second test of the Fair Play Act, a business can be deemed a “separate business entity” and entitled to an “independent contractor/separate business entity” classification. More specifically, the legislation provides that “[a] business entity, including any sole proprietor, partnership, firm, corporation, limited liability company, association, or other legal entity that may also be a commercial goods transportation contractor under the [Fair Play Act] shall be a separate business entity from the commercial goods transportation contractor” (and thus entitled to independent contractor status) where each of the following eleven enumerated statutory requirements are satisfied:

- (i) 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.
- (ii) The business entity is not subject to cancellation or destruction upon severance of the relationship with the commercial goods transportation contractor.
- (iii) The business entity has a substantial investment of capital in the business entity, including but not limited to ordinary tools and equipment.
- (iv) The business entity owns or leases the capital goods and gains the profits and bears the losses of the business entity.
- (v) The business entity may make its services available to the general public or others not a party to the business entity’s written contract referenced in [item (viii) below] in the business community on a continuing basis.
- (vi) The business entity provides services reported on a Federal Income Tax Form 1099, if required by law.

- (vii) 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 an independent contractors or separate business entities."
- (viii) 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.
- (ix) If necessary, the business entity hires its own employees without the commercial goods transportation contractor's approval, subject to applicable qualification requirements of federal or state laws, rules or regulations, and pays the employees without reimbursement from the commercial goods transportation contractor.
- (x) 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.
- (xi) The business entity has the right to perform similar services for others on whatever basis and whenever it chooses.

Civil and Criminal Penalties and Remedies

The Fair Play Act provides for civil and criminal penalties. It also expressly creates a private cause of action for retaliation and further announces that nothing in the Fair Play Act limits the availability of any other legal remedies.

An unintentional first violation of the Fair Play Act will result in up to a \$1,500 civil penalty and each such additional violation over the ensuing five year period will result in penalties of up to \$5,000. However, penalties for intentional misclassifications are more severe. More specifically, any commercial goods transportation contractor who willfully misclassifies an employee as an independent contractor (meaning that the contractor "knew or should have known" that an "independent contractor" classification was contrary to the Fair Play Act) is subject to a civil penalty of \$2,500 per misclassified employee for the first violation, and \$5,000 per misclassified employee for each subsequent similar violation within a five year period.

In addition to the civil penalties, the Fair Play Act also imposes criminal penalties against commercial goods transportation contractors who willfully violate the Fair Play Act. An offense under the statute is a misdemeanor. A first criminal offense is punishable "by imprisonment of not more than thirty days or a fine not to exceed [\$25,000]" and each subsequent criminal offense "shall be punishable by imprisonment for not more than sixty days or a fine not to exceed [\$50,000]."

Moreover, where an offending commercial goods transportation contractor is a corporation, "any officer of such corporation or shareholder who owns or controls at least ten percent of the outstanding stock of such corporation who knowingly permits the corporation to willfully violate [the Fair Play Act]" are subject to the same civil and criminal penalties as apply to the contractor entity.

The Fair Play Act's misclassification provisions do not specifically establish a private right of action for violations and directs a driver/provider who has been misclassified to file a complaint with the Commissioner of Labor who can impose civil penalties. However, the Fair Play Act expressly provides that "[n]othing in this section shall limit the availability of other remedies at law or in equity for a violation of this [Fair Play Act]."

Notably, the Fair Play Act does contain broad protections against retaliation and further expressly creates a private cause of action for such conduct (and also permits the Commissioner to impose the civil penalties available under the Fair Play Act against any offending entity). More particularly, the Fair Play Act provides that "it is a violation of the [Fair Play Act] for an employer or any agent of the employer, to retaliate through discharge or in any other manner against any person in the terms [or] conditions of his or her employment for exercising any rights granted under [the Fair Play Act]." The Fair Play Act further expressly provides that "any act of retaliation . . . shall subject an employee to the civil penalties under [the Act], or to a private cause of action, or both."

Posting Requirement

The Fair Play Act also contains a "posting requirement" mandating that all "commercial goods transportation contractors" (which includes, by the Fair Play Act's definition, commercial goods transportation subcontractors) post in a conspicuous place a notice that describes the responsibilities of independent contractors "to pay taxes required by state and federal law, the rights of employees to workers' compensation, unemployment benefits, minimum wage, overtime and other federal and state workplace protections and the protections against retaliation and the penalties [for misclassification under the Fair Play Act]." The notice must contain contact information for filing a misclassification complaint and be in languages as required by the Commissioner of Labor. The NYSDOL will create and make accessible a sample notice on its website within 30 days of the effective date of the Fair Play Act. Failure to post the required notice may result in a civil penalty of up to \$1,500 for a first violation and up to \$5,000 per violation over the ensuing five year period.

Conclusion

In short, the Fair Play Act represents a significant departure from the traditional analysis of classifying workers who transport commercial goods within New York as either "employees" or "independent contractors." If you need any assistance relating to the impact of this new law upon you or your business, you should seek counsel from an attorney familiar with this new legislation.

About the Author

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