



White and Williams LLP



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CONSTRUCTION SERVICES EMPLOYERS BEWARE: THE DELAWARE WORKPLACE FRAUD ACT IS NOW LAW

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Effective October 29, 2009, the Delaware Workplace Fraud Act imposes significant monetary and other penalties on "construction services" employers who willfully misclassify employees as "independent contractors" to save on business costs and avoid paying appropriate taxes. "Construction services" is broadly defined as "all building or work on buildings, structures, and improvements of all types," including landscaping. The Act presumes that an employer-employee relationship exists whenever work is performed for remuneration. The burden is on the employer to demonstrate that a worker is an independent contractor or otherwise exempt from the Act. Given the significant penalties for violation of the Act, employers should carefully consider its applicability to them before hiring an independent contractor.

The Delaware Department of Labor is charged with accepting and investigating complaints under the Act and for enforcing its provisions. The Act affords the DDOL comprehensive investigatory rights, including full access to an employers' records, site inspections, statements under oath, and subpoena power. If the DDOL issues an initial finding of a violation of the Act, the employer may pursue an administrative appeal. Where no appeal is taken or the finding is upheld on appeal, the DDOL may file suit in the Superior Court to enforce its penalties.

Employers may be penalized \$1,000-\$5,000 per misclassified employee. If an employer fails to provide the information requested by the DDOL in the course of an investigation within 30 days of the request, the DDOL may issue a stop work order and/or penalize the employer \$500 per day until the information is provided. An employer found to have discriminated or retaliated against anyone making a complaint

or participating in an investigation under the Act may be subject to a penalty of \$5,000-\$10,000 per occurrence. Anyone found to have assisted in the formation of a business entity intended to evade the requirements of the Act or to have otherwise aided and abetted an employer in a violation of the Act is subject to a penalty of up to \$20,000 per occurrence. Employers violating the Act twice in a two-year period are subject to debarment from public contracts for up to five years and may be penalized up to \$20,000 per misclassified employee. Officers who knowingly permit their business entity to violate the Act may be held personally liable for the violation.

At the time of hiring, an employer must provide certain written notices to an independent contractor. The employer must also maintain certain records pertaining to employees and independent contractors for up to three years. Failure to comply with the notice or record-keeping requirements of the Act subjects the employer to a penalty of \$500 for each occurrence.

If the DDOL does not commence an investigation or file suit within 90 days of being notified of a potential violation, the charging party may file suit in Superior Court for declaratory relief and "actual damages," which is defined to include treble damages for lost wages and benefits as well as attorneys' fees and costs. There is a three year statute of limitations for any civil action brought under the Act.

Employers must be concerned with more than the DDOL. The DDOL will share information gathered in its investigations with other State agencies, including the Division of Unemployment Insurance, the Office of Workers' Compensation, the Department of Insurance, the Office of the Attorney General, and the Division of Revenue. Employers found in violation of

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the Act must make retribution and pay interest due to all relevant State agencies.

The DDOL is tasked with promulgating regulations to govern its application and enforcement of the Act. Until such regulations are finalized and there is a history of their application, any employer potentially within the construction services field should tread carefully before hiring a worker as an independent contractor. The attorneys at White and Williams LLP can assist with any issues regarding the Act.

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