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Department
of Labor

FAIR PLAY ACT

New York State Construction Industry

The New York State Construction Industry Fair Play Act took effect on October 26, 2010. The law creates a new standard for determining whether a worker is an employee or independent contractor in the construction industry. It provides new penalties for employers who fail to properly classify their employees.

Studies estimate that anywhere from 15 to 25 percent of construction workers may be misclassified in New York State. Employee misclassification occurs when employers treat workers who should be considered employees as independent contractors or simply do not report them (pay them “off the books”).

NEW STANDARD

The law presumes that individuals working for an employer are employees unless they meet all three criteria below. The individual must be:

1. Free from control and direction in performing the job, both under contract and in fact.
2. Performing services outside of the usual course of business for the company.
3. Engaged in an independently established trade, occupation or business that is similar to the service they perform.

SEPARATE BUSINESS ENTITY

The law also contains a 12-part test to determine when a sole proprietor, partnership, corporation or other entity will be considered a “separate business entity” from the contractor for whom it provides a service. If an entity meets all of the 12 criteria, it will not be considered an employee of the contractor. Instead it will be a separate business that is itself subject to the new law regarding its own employees. The 12 criteria for a separate business entity appear on the back page of this fact sheet.

COVERAGE

The law applies to all contractors in the construction industry. Construction is defined as including constructing, reconstructing, altering, maintaining, moving, rehabilitating, repairing, renovating or demolition of any building, structure or improvement or relating to the excavation of or other development or improvement to land.

AGENCIES COVERED

The new standard for determining employment applies to determinations under the Labor Law (including labor standards, prevailing wage law and unemployment insurance) and the Workers’ Compensation Law. It does not apply to determinations under the New York State Tax Law. The New York State Department of Taxation and Finance will continue to use its existing standards for determining employment status. The penalties provided by the new law apply to determinations of misclassification under the Labor Law, Workers’ Compensation Law and the New York State Tax Law.

PENALTIES

An employer that willfully violates the Fair Play Act by failing to properly classify its employees will be subject to civil penalties of up to a \$2,500 fine per misclassified employee for a first violation and up to \$5,000 per misclassified employee for a second violation within a five-year period.

Employers also may be subject to criminal prosecution (a misdemeanor) for violations of the act with a penalty of up to 30 days in jail, up to a \$25,000 fine and debarment from Public Work for up to one year for a first offense. Subsequent misdemeanor offenses would be punishable by up to 60 days in jail, up to a \$50,000 fine and debarment from performing Public Work for up to five years.

Employers also remain subject to all of the existing penalties, taxes and restitution for Labor Law, Workers' Compensation Law and Tax Law violations that result from the worker misclassification. Corporate officers and certain shareholders may be personally liable for the fines and penalties under the Act, where they knowingly permit the violations to occur.

POSTING

Construction industry employers must post a notice about the Fair Play Act in a prominent and accessible place on the job site. The required notice is available on the Department of Labor's web site. Failure to post the notice can result in penalties of up to \$1,500 for a first offense and up to \$5,000 for a second offense.

CONTACT US

If you have any questions concerning the Fair Play Act or if you wish to report suspected worker misclassification, please call the Department of Labor toll-free at **866-435-1499** or e-mail us at dol.misclassified@labor.ny.gov.

The full text of the Fair Play Act appears on the department's web site at www.labor.ny.gov.

To find out more about the New York State Department of Labor go to www.labor.ny.gov.

SEPARATE BUSINESS ENTITY TEST

To be considered a separate business entity from the business to which services are provided, a sole proprietor, partnership, corporation or other entity must:

1. Be 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 contractor to specify the desired result.
2. Not be subject to cancellation when its work with the contractor ends.
3. Have a substantial investment of capital in the entity beyond ordinary tools and equipment and a personal vehicle.
4. Own the capital goods and gain the profits and bear the losses of the entity.
5. Make its services available to the general public or business community on a regular basis.
6. Include the services provided on a federal income tax schedule as an independent business.
7. Perform the services under the entity's name.
8. Obtain and pay for any required license or permit in the entity's name.
9. Furnish the tools and equipment necessary to provide the service.
10. Hire its own employees without contractor approval, pay the employees without reimbursement from the contractor and report the employees' income to the Internal Revenue Service.
11. Have the right to perform similar services for others on whatever basis and whenever it chooses.
12. The contractor does not represent the entity or the employees of the entity as its own employees to its customers.

The entity must meet all 12 criteria to be considered a separate business entity.

NEW YORK CORRECTION LAW
ARTICLE 23-A

LICENSURE AND EMPLOYMENT OF PERSONS PREVIOUSLY
CONVICTED OF ONE OR MORE CRIMINAL OFFENSES

Section 750. Definitions.

751. Applicability.

752. Unfair discrimination against persons previously convicted of one or more criminal offenses prohibited.

753. Factors to be considered concerning a previous criminal conviction; presumption.

754. Written statement upon denial of license or employment.

755. Enforcement.

§750. Definitions. For the purposes of this article, the following terms shall have the following meanings:

(1) "Public agency" means the state or any local subdivision thereof, or any state or local department, agency, board or commission.

(2) "Private employer" means any person, company, corporation, labor organization or association which employs ten or more persons.

(3) "Direct relationship" means that the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity, or job in question.

(4) "License" means any certificate, license, permit or grant of permission required by the laws of this state, its political subdivisions or instrumentalities as a condition for the lawful practice of any occupation, employment, trade, vocation, business, or profession. Provided, however, that "license" shall not, for the purposes of this article, include any license or permit to own, possess, carry, or fire any explosive, pistol, handgun, rifle, shotgun, or other firearm.

(5) "Employment" means any occupation, vocation or employment, or any form of vocational or educational training. Provided, however, that "employment" shall not, for the purposes of this article, include membership in any law enforcement agency.

§751. Applicability. The provisions of this article shall apply to any application by any person for a license or employment at any public or private employer, who has previously been convicted of one or more criminal offenses in this state or in any other jurisdiction, and to any license or employment held by any person whose conviction of one or more criminal offenses in this state or in any other jurisdiction preceded such employment or granting of a license, except where a mandatory forfeiture, disability or bar to employment is imposed by law, and has not been removed by an executive pardon, certificate of relief from disabilities or certificate of good conduct. Nothing in this article shall be construed to affect any right an employer may have with respect to an intentional misrepresentation in connection with an application for employment made by a prospective employee or previously made by a current employee.

§752. Unfair discrimination against persons previously convicted of one or more criminal offenses prohibited. No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless:

(1) There is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or

(2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

§753. Factors to be considered concerning a previous criminal conviction; presumption. 1. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall consider the following factors:

(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

(b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.

(c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.

(d) The time which has elapsed since the occurrence of the criminal offense or offenses.

(e) The age of the person at the time of occurrence of the criminal offense or offenses.

(f) The seriousness of the offense or offenses.

(g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

(h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

2. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.

§754. Written statement upon denial of license or employment. At the request of any person previously convicted of one or more criminal offenses who has been denied a license or employment, a public agency or private employer shall provide, within thirty days of a request, a written statement setting forth the reasons for such denial.

§755. Enforcement. 1. In relation to actions by public agencies, the provisions of this article shall be enforceable by a proceeding brought pursuant to article seventy-eight of the civil practice law and rules.

2. In relation to actions by private employers, the provisions of this article shall be enforceable by the division of human rights pursuant to the powers and procedures set forth in article fifteen of the executive law, and, concurrently, by the New York city commission on human rights.

Guidelines for Employers: Requirements to Notify Employees About Time Off and Work Hours

Section 195.5 of the New York State Labor Law effective December 12, 1981 provides as follows:

“Every employer shall notify his employees in writing or by publicly posting the employer’s policy on sick leave, vacation, personal leave, holidays and hours.”

To assist employers in complying with this provision, the Division of Labor Standards has issued the following guidelines:

1. An employer shall distribute in writing to each employee, the employer’s policy on the above- enumerated items. The employer upon the request of the Department must be able to affirmatively demonstrate that such written notification was provided to employees by means, which may include, but not be limited to, distribution through company newspapers or newsletters or by inclusion in a company payroll.

Or

An employer shall post and keep posted in each establishment in a conspicuous place where notices to employees are customarily posted, a notice that states where on the employer’s premises they may see such information in writing. Such information may be contained in a union contract, employee handbook, personnel manual, or in other written form. Deviations for an employee from such stated policy must be given to said employee in writing.

2. As used in the provision above, “hours” means the hours which constitute a standard workday and workweek for the establishment, and any other regular schedule, such as for part-time employees. Deviations should be given to the affected employee in writing.

For more information, call or write the nearest office of the Division of Labor Standards, of the New York State Department of Labor, listed below:

Albany District
State Office Campus
Bldg. 12 Room 185A
Albany, NY 12240
(518) 457-2730

Binghamton
Sub-District
44 Hawley Street
Binghamton, NY 13901
(607) 721-8014

New York City District
75 Varick Street
7th Floor
New York, NY 10013
(212) 775-3880

Garden City District
400 Oak Street
Suite 101
Garden City, NY 11530
(516) 794-8195

Buffalo District
65 Court Street
Room 202
Buffalo, NY 14202
(716) 847-7141

Rochester
Sub-District
276 Waring Road
Room 104
Rochester, NY 14609
(585) 258-4550

Syracuse District
333 East Washington Street
Room 121
Syracuse, NY 13202
(315) 428-4057

White Plains District
120 Bloomingdale Road
White Plains, NY 10605
(914) 997-9521

WE ARE YOUR DOL

NEW YORK
STATE OF
OPPORTUNITY.
Department
of Labor

NEW YORK STATE MINIMUM WAGE

AS A WORKER, WHAT IS MY MINIMUM WAGE?

From 12/31/2021 to 12/30/2022, the New York State basic minimum wage is:

- \$15.00 per hour in New York City
- \$15.00 per hour in Long Island and Westchester County
- \$13.20 per hour in the Remainder of New York State

From 12/31/2021 to 12/30/2022, the minimum wage for fast food workers* is:

- \$15.00 per hour in all of New York City
- \$15.00 per hour in the rest of New York State

Private sector employees in the state, including domestic workers (in most cases), must receive the basic minimum wage.

SPECIAL CIRCUMSTANCES

The basic rate may change under rules known as “wage orders” that set minimum pay for jobs in:

- The hospitality, building service and farming industries
- All other industries and occupations

The wage orders set:

- Hourly rates
- Overtime rates
- Credits for meals and lodging, if supplied by the employer

Several wage orders set lower hourly minimum pay rates if workers regularly receive tips. These wage orders are published on the Department of Labor website at www.labor.ny.gov/minimumwage.

When workers take care of their own required uniforms, they must be paid an added amount over minimum wage.

Employees who do piecework should be paid at a rate that brings them to at least the basic minimum wage.

A standard work week is 40 hours. If employees work any hours beyond that, then the employer must pay them at 1½ times the regular wage.

AS AN EMPLOYER, HOW DO I COMPLY WITH ALL ASPECTS OF MINIMUM WAGE LAW?

The Labor Department helps collect back wages for workers who have not received the minimum wage. Employers that break the Minimum Wage Law may be subject to orders to pay:

- Back wages
- Interest
- Liquidated damages
- Fines

They may also be subject to criminal prosecution and penalties. The fines for violations can total up to 200 percent of the missing wages. They may also have to pay 16 percent interest on the unpaid wages.

Employers must place a Minimum Wage poster in their place of business where workers can see it.

Employers with questions or concerns about obeying the Minimum Wage Law can contact the Labor Department at **888-469-7365** for help, between 8 am and 5 pm, Monday through Friday.

*A fast food worker is any person employed or permitted to work at, or for, a fast food establishment by any employer where such person’s job duties include at least one of the following: customer service, cooking, food or drink preparation, delivery, security, stocking supplies or equipment, cleaning, or routine maintenance.

Public Employees Job Safety & Health Protection

The New York State Public Employee Safety and Health Act of 1980 provides job safety and health protection for workers through the promotion of safe and healthful working conditions throughout the State. Requirements of the Act include the following:

Employers

Employers must provide employees with a workplace that is:

- free from recognized hazards,
- in compliance with the safety and health standards that apply to the workplace, and
- in compliance with any other regulations issued under the PESH Act by the Commissioner of Labor.

Employees

Employees must comply with all safety and health standards that apply to their actions on the job. Employees must also comply with any regulations issued under the PESH Act that apply to their job.

Enforcement

The New York State Department of Labor administers and enforces the PESH Act. The Commissioner of Labor issues safety and health standards. The Department's Division of Safety and Health (DOSH) has Inspectors and Hygienists who inspect workplaces to make sure they are following the PESH Act.

Inspection

When DOSH staff inspect a workplace, a representative of the employer and a representative approved by the employees must be allowed to help with the inspection. When there is no employee-approved representative, DOSH staff must speak with a fair number of employees about the safety and health conditions in the workplace.

Order to Comply

If the Department believes an employer has violated the PESH Act, we will issue an order to comply notice to the employer. The order will list dates by which each violation must be fixed. If violations are not fixed by those dates, the employer may be fined.

The order to comply must be posted at or near the place of violation, where it can be easily seen. This is to warn employees that a danger may exist.

Complaint

Any interested person may file a complaint if they believe there are unsafe or unhealthful conditions in a public workplace. This includes:

- An employee
- A representative of an employee
- Groups of employees
- A representative of a group of employees

Make this complaint in writing to the nearest DOSH office or by email to: Ask.SHNYPESH@labor.ny.gov. On request, DOSH will not release the names of any employees who file a complaint. The Department of Labor will evaluate each complaint. The Department will notify the person who made the complaint of the results of the investigation.

These complaints may also be made to the United States Department of Labor, Occupational Safety and Health Administration online at: www.osha.gov.

Discrimination

Employees may not be fired or discriminated against in any way for filing safety and health complaints or otherwise exercising their rights under the Act.

If an employee believes that they have been discriminated against, he or she may file a complaint with the nearest DOSH office. File this complaint within 30 days of the discrimination incident.

Voluntary Activity

The Department of Labor encourages employers and employees to voluntarily:

- reduce workplace hazards, and
- develop and improve safety and health programs in all workplaces.

The Division of Safety and Health can provide free help with identifying and correcting job site hazards. Employers may request this assistance on a voluntary basis by emailing: Ask.SHNYPESH@labor.ny.gov.

Additional information may be obtained from the nearest DOSH District Office below:

Albany District

State Office Campus
Bldg. 12, Rm. 158
Albany, NY 12240
Tel: (518) 457-5508

Binghamton District

44 Hawley St., Rm. 901
Binghamton, NY 13901
Tel: (607) 721-8211

Buffalo District

65 Court Street
Buffalo, NY 14202
Tel: (716) 847-7133

Garden City District

400 Oak Street
Garden City, NY 11550
Tel: (516) 228-3970

New York City District

75 Varick St., 7th Floor
New York, NY 10013
Tel: (212) 775-3554

Rochester District

109 S. Union St., Rm. 402
Rochester, NY 14607
Tel: (585) 258-8806

Syracuse District

450 South Salina Street
Syracuse, NY 13202
Tel: (315) 479-3212

Utica District

207 Genesee Street
Utica, NY 13501
Tel: (315) 793-2258

White Plains District

120 Bloomingdale Road
White Plains, NY 10605
Tel: (914) 997-9514

Post Conspicuously

A Division of the New York State Department of Labor