

3
4 THE NEW YORK STATE CONSTRUCTION INDUSTRY FAIR PLAY ACT

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13 § 861. Short title. This article shall be known and may be cited as "the New
14 York state construction industry fair play act".

15
16 § 861-a. Legislative findings and intent. The legislature hereby finds and declares
17 that New York state's construction industry is experiencing dangerous levels of
18 employee misclassification fraud. Unscrupulous employers are intentionally
19 reporting employees as independent contractors to state and federal
20 authorities or workers' compensation carriers in record numbers. In addition,
21 there has been an explosion of employers who operate in the underground
22 economy and fail to report all or a sizable portion of their workers. The
23 legislature hereby finds and declares that recent studies of New York city's

1 construction industry alone suggests that as many as fifty thousand New York
2 city construction workers -- nearly one in four -- are either misclassified as
3 independent contractors or are employed by construction contractors
4 completely off the books. Construction industry fraud reduces government
5 revenue, shifts tax and workers' compensation insurance costs to law-abiding
6 employees, lowers working conditions and steals jobs from legitimate employers
7 and their employees. Therefore, the legislature hereby finds and declares that
8 government has an obligation to curb this underground economy, enforce
9 long-standing employment laws, ensure compliance with essential social
10 insurance protections and eliminate the unfair competitive advantage from
11 contractors in the underground economy by and through the enactment of the
12 New York state construction industry fair play act.

13
14 § 861-b. Definitions. As used in this article:

15 1. "Construction" means constructing, reconstructing, altering,
16 maintaining, moving, rehabilitating, repairing, renovating or demolition of any
17 building, structure, or improvement, or relating to the excavation of or other
18 development or improvement to land.

19 2. "Contractor" means any sole proprietor, partnership, firm,
20 corporation, limited liability company, association or other legal entity
21 permitted by law to do business within the state who engages in construction as
22 defined in this article.

1 3. "Contractor" includes a general contractor and a subcontractor.

2 4. "Department" means the department of labor.

3 5. "Commissioner" means the commissioner of labor.

4 6. "Employer" means any contractor that employs individuals deemed
5 employees under this article.

6
7 § 861-c. Presumption of employment in the construction industry. 1. Any
8 person performing services for a contractor shall be classified as an employee
9 unless the person is a separate business entity under subdivision two of this
10 section or all of the following criteria are met, in which case the person shall
11 be an independent contractor:

12 (a) the individual is free from control and direction in performing
13 the job, both under his or her contract and in fact;

14 (b) the service must be performed outside the usual course of
15 business for which the service is performed; and

16 (c) the individual is customarily engaged in an independently
17 established trade, occupation, profession, or business that is similar to the
18 service at issue.

19 2. A business entity, including any sole proprietor, partnership, corporation
20 or entity that may be a contractor under this section shall be considered a
21 separate business entity from the contractor where all the following criteria are
22 met:

1 (a) the business entity is performing the service free from the
2 direction or control over the means and manner of providing the service,
3 subject only to the right of the contractor for whom the service is provided to
4 specify the desired result;

5 (b) the business entity is not subject to cancellation or destruction
6 upon severance of the relationship with the contractor;

7 (c) the business entity has a substantial investment of capital in the
8 business entity beyond ordinary tools and equipment and a personal vehicle;

9 (d) the business entity owns the capital goods and gains the profits
10 and bears the losses of the business entity;

11 (e) the business entity makes its services available to the general
12 public or the business community on a continuing basis;

13 (f) the business entity includes services rendered on a Federal
14 Income Tax Schedule as an independent business or profession;

15 (g) the business entity performs services for the contractor under the
16 business entity's name;

17 (h) when the services being provided require a license or permit,
18 the business entity obtains and pays for the license or permit in the business
19 entity's name;

20 (i) the business entity furnishes the tools and equipment necessary to
21 provide the service;

1 (j) if necessary, the business entity hires its own employees without
2 contractor approval, pays the employees without reimbursement from the
3 contractor and reports the employees' income to the Internal Revenue Service;

4 (k) the contractor does not represent the business entity as an
5 employee of the contractor to its customers; and

6 (l) the business entity has the right to perform similar services for
7 others on whatever basis and whenever it chooses.

8 3. The failure to withhold federal or state income taxes or to pay
9 unemployment compensation contributions or workers' compensation
10 premiums with respect to an individual's wages shall not be considered in
11 making a determination under this section, except as set forth in paragraph (f)
12 of subdivision two of this section.

13 4. An individual's act of securing workers' compensation insurance with a
14 carrier as a sole proprietor, partnership or otherwise shall not be binding on any
15 determination under this section.

16 5. When a business entity meets the definition of a separate business entity
17 pursuant to subdivision two of this section, the separate business entity will be
18 considered a contractor subject to all the provisions of this article in regard
19 to the classification of individuals performing services for it.

20
21 § 861-d. Notice to persons receiving remuneration from contractors and
22 subcontractors. 1. Every contractor shall post in a prominent and accessible

1 place on the site where the construction is performed a legible statement,
2 provided by the commissioner, that describes the responsibility of independent
3 contractors to pay taxes required by state and federal law, the rights of
4 employees to workers' compensation, unemployment benefits, minimum
5 wage, overtime and other federal and state workplace protections, and the
6 protections against retaliation and the penalties in this article if the contractor
7 fails to properly classify an individual as an employee. This notice shall also
8 contain contact information for individuals to file complaints or inquire with the
9 commissioner about employment classification status. This information shall
10 be provided in English, Spanish or other languages required by the
11 commissioner. The posted statement shall be constructed of materials capable
12 of withstanding adverse weather conditions.

13 2. Within thirty days of the effective date of this article, the
14 commissioner shall create the notice described in subdivision one of this
15 section and post the notice on the department's website for downloading
16 by contractors.

17 3. Contractors who violate this section shall be subject to a civil penalty
18 of up to one thousand five hundred dollars for a first violation, and up to
19 five thousand dollars for a subsequent violation within a five year period.

20
21 § 861-e. Violations and penalties. 1. Any contractor who wilfully fails to
22 properly classify an individual as an employee as provided under section

1 eight hundred sixty-one-c of this article shall be subject to the civil and
2 criminal penalties provided under this section. The civil penalties set forth in this
3 section shall be imposed as follows: by the commissioner where such penalty
4 is based on a violation of this chapter; by the chair of the workers'
5 compensation board where such penalty is based on a violation of the
6 workers' compensation law; and by the commissioner of tax and finance
7 when such penalty is based on a violation of the tax law, provided that no more
8 than one civil penalty under this section may be imposed per employee
9 per incident of misclassification.

10 (a) The workers' compensation board shall provide a copy of any
11 order relating to the misclassification of an employee, the intentional and
12 material underpayment or concealment of payroll, or the failure to secure
13 workers' compensation in the construction industry to the commissioner and
14 commissioner of taxation and finance no later than seven days after the
15 issuance of the order.

16 (b) Notwithstanding the secrecy provisions contained in articles
17 nine-A and twenty-two of the tax law, the department of taxation and
18 finance shall provide a copy of any assessment for failure to pay business,
19 corporate or personal income tax by an employer in the construction
20 industry arising out of the misclassification of an employee to the
21 commissioner and chair of the workers' compensation board no later than
22 seven days after the issuance of the assessment.

1 (c) Upon the issuance of an order or determination by the
2 commissioner for a violation and penalties under this article, the commissioner
3 shall provide a copy of the order to the chair of the workers' compensation
4 board and the commissioner of taxation and finance no later than seven days
5 after the issuance of the order.

6 2. For the purposes of this section, the term "willfully violates" means a
7 contractor knew or should have known that his or her conduct was prohibited
8 by this section.

9 3. Any contractor who willfully violates section eight hundred sixty-
10 one-c of this article shall be subject to a civil penalty of up to twenty-five
11 hundred dollars for the first violation per misclassified employee and to a civil
12 penalty of up to five thousand dollars for each subsequent violation per
13 misclassified employee within a five year period.

14 4. In addition to civil penalties, the criminal penalties imposed on a
15 contractor who willfully violates the provisions of this article shall be a
16 misdemeanor and upon conviction shall be punished for a first offense by
17 imprisonment for not more than thirty days or a fine not to exceed twenty-five
18 thousand dollars and for a subsequent offense by imprisonment for not more
19 than sixty days or a fine not to exceed fifty thousand dollars.

20 5. If the contractor is a corporation, any officer of such corporation or
21 shareholder who owns or controls at least ten percent of the outstanding
22 stock of such corporation who knowingly permits the corporation to willfully

1 violate the provisions of this article shall also be in violation of this article and
2 the civil and criminal penalties herein shall attach to such officer upon
3 conviction.

4 6. Any contractor subject to civil penalties under this article shall also be
5 subject to any other applicable penalties or remedies provided by law for
6 failure to pay any other statutory payment or coverage obligations, including
7 but not limited to, unemployment insurance, workers' compensation
8 insurance, or business, corporate or personal income tax, as follows:

9 (a) for failure to pay unemployment insurance tax, the penalties
10 imposed by section five hundred seventy of this chapter.

11 (b) for intentional and material understatement or concealment
12 of payroll or failure to secure workers' compensation insurance, the penalties
13 imposed by paragraph (d) of subdivision one of section fifty-two of the
14 workers' compensation law, and for failure to keep a true and accurate
15 record pursuant to section one hundred thirty-one of the workers' compensation
16 law, the penalties of section one hundred thirty-one of the workers'
17 compensation law.

18 (c) for failure to pay business, corporate or personal income tax, the
19 penalties imposed by section six hundred eighty-five and one thousand eighty-
20 five of the tax law.

21 7. Any contractor or any officer or shareholder who owns or controls at
22 least ten percent of the outstanding stock of such corporation that has been

1 convicted of a misdemeanor shall be subject to debarment and be ineligible to
2 submit a bid on or be awarded any public works contract with the state, any
3 municipal corporation, public benefit corporation, public authority or public
4 body for a period of up to one year from the date of such conviction or final
5 determination, or up to five years in the event of any subsequent violation.

6 8. Any substantially owned affiliated entity of a contractor, as defined
7 by paragraph g of subdivision five of section two hundred twenty of this
8 chapter, shall be subject to the same civil penalty provided under this article
9 for a violation of such provision.

10 9. Any penalties imposed under this section by the commissioner shall be
11 appealed to the industrial board of appeals in accordance with article three
12 of this chapter. Any penalties imposed under this section by the workers'
13 compensation board or commissioner of taxation and finance shall be
14 appealed in the same manner as the underlying violation.

15 10. Nothing in this section shall limit the availability of other remedies at
16 law or in equity for a violation of this article.

17 11. Any fee or penalty assessed for a violation of this article shall be
18 deposited into the department's fee and penalty account.

19
20 § 861-f. Retaliation. 1. It is a violation of this article for an employer or any
21 agent of any employer, to retaliate through discharge or in any other manner

1 against any person in the terms of conditions of his or her employment for
2 exercising any rights granted under this article for:

3 (a) making, or threatening to make, a complaint to an
4 employer, co-worker or to a public body that rights guaranteed under this
5 article have been violated;

6 (b) causing to be instituted any proceeding under or related to this
7 article; or

8 (c) providing information to, or testifying before, any public body
9 conducting an investigation, hearing or inquiry into any such violation of a law,
10 rule or regulation by such employer. Nothing in this section shall limit the
11 commissioner's authority under section two hundred fifteen of the labor law, or
12 any other statute.

13 2. Any act of retaliation under this section shall subject an employer to the
14 civil penalties under section eight hundred sixty-one-e of this article, or to a
15 private cause of action, or both.