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Alert

Employment & Labor Practice Group

# New York State Cracks Down on Use of Independent Contractors by Transportation and Delivery Companies

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Governor Cuomo signed into law the New York State Commercial Goods Transportation Industry Fair Play Act ("Fair Play Act") on January 10, 2014. The Fair Play Act becomes effective on March 11, 2014 and significantly restricts the use of independent contractors by transportation and delivery companies. The State justifies the new law based on a study which claims that tens of thousands of employees continue to be misclassified by employers and that such misclassifications are disproportionately high in the trucking industry.

Under the Fair Play Act, commercial goods transportation companies may not treat a driver as an independent contractor unless a stringent test is met to confirm the driver's status as an "independent contractor." The statute creates a presumption that all drivers are employees unless proven otherwise. Employers may overcome the presumption by meeting the conditions of an 11 part test. Among other things, the test requires employers to demonstrate that the driver operated under a separate business entity and that the separate entity: (i) is not subject to cancellation or destruction upon severance of the relationship with the employer; (ii) owns or leases capital goods and is subject to profits and losses; (iii) has a legitimate option to offer the same services to the general public on a continuing basis; (iv) has a written contract with the employer; (v) independently pays for necessary licenses and permits; and (vi) hires, pays and controls its own employees.

Absent proof satisfying the 11 factor test, an employer seeking to establish a driver as an independent contractor must show that the driver is: (i) free from control and direction in performing their job; (ii) customarily engaged in an independently established business or profession involving the transportation of goods; and that (iii) the transportation service is performed outside of the usual course of business for which the service is performed.

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The Fair Play Act imposes steep penalties on employers that "willfully" fail to properly classify their employees. The Act provides for civil penalties of $2,500 per each misclassified employee for the first violation, and up to $5,000 for each subsequent misclassification within a five year period. Additionally, the Act contains criminal penalties including imprisonment for not more than 30 days or a fine not to exceed $25,000 for the first violation, and imprisonment for not more than 60 days or a fine not to exceed $50,000 for each subsequent offense.

Finally, the Fair Play Act makes it unlawful for an employer to retaliate against an employee who seeks to assert rights under the Act. Thus, where an employee makes or threatens to make a complaint to an employer, co-worker, or public body that his or her rights guaranteed under the Fair Play Act have been violated, the employee is protected from any adverse employment action.

While this law is clearly an attempt to crack down on employer misuse of independent contractors, the law may be seen as providing a recipe for employers to use when desiring to maintain independent contractor relationships with their drivers. By ensuring that the 11 part test is satisfied with its drivers, employers can feel confident that their use of independent contractors will avoid problems and penalties from the Department of Labor. To ensure proper compliance with the statute, we recommend that employers work with their counsel to: (i) draft appropriate independent contractor agreements with their drivers; and (ii) ensure that the 11 part test set forth in the statute is satisfied.

The Employment & Labor Practice Group at **Bousquet Holstein PLLC** provides representation to employers, large and small, and to employees. Our attorneys make it a priority to become familiar with our clients' businesses. We emphasize addressing employment, discrimination, and labor issues before they become problems and we advise our clients in all areas of human relations and human resource practices to satisfy our clients' business objectives. If we can provide you with additional insight and information regarding how this law may impact your business, please contact **John L. Valentino**. John Valentino is a Managing Member of Bousquet Holstein PLLC, (www.BHlawPLLC.com) and concentrates his practice in the areas of Business Transactions and Employment Law. He can be reached directly at **315.701.6308** or **jvalentino@BHLAWPLLC.com.**