New York's "Construction Industry Fair Play Act"—information for contractors about workers' compensation insurance

Effective Oct. 26, 2010, the New York State Construction Industry Fair Play Act (FPA) created a new standard for determining whether a worker in the construction industry is an employee or an independent contractor. "Misclassification" occurs when an employer treats a worker as an independent contractor when the FPA says the worker should be classified as an employee. The FPA creates a strong presumption that construction workers are employees.

The FPA impacts how workers are classified for purposes of workers' compensation insurance. FPA standards also apply to determinations under Labor Law, for purposes of unemployment insurance, prevailing wage law and [illegible]. For purposes of New York State [illegible], the FPA adds new penalties for misclassi[illegible]

Information presented here focuses on the FPA as it relates to **workers' compensation insurance**.

What is meant by "a separate business entity" in construction when it comes to employees?

The law presumes that individuals working in the construction industry are employees unless they meet all THREE criteria the FPA establishes. To be classified as an independent contractor, the individual must:

1. be free from control and direction in performing the job, both under the contract and in fact;
2. perform services that are outside the usual work of the employer or the employer doing the job for; and
3. have an independently established trade, occupation, profession or business that is similar to the work performed.

The third criterion is the "separate business entity" test. More information on this test appears on the next page.

What is affected by the FPA?

The FPA applies to all contractors and workers in the construction industry. "Construction" is defined to include demolition, reconstructing, altering, painting, moving, rehabilitating, repairing, renovating or demolishing any building, structure or improvement. "Construction" also includes the excavation of land, as well as other development or improvement to land.

Who is considered a "contractor"?

A "contractor" is any sole proprietor, partnership, firm, corporation, limited liability company, association or other legal entity permitted by law to do business in New York state, who engages in construction. [illegible] a general contractor [illegible].

[illegible] qualify as independent contractors by meeting all three tests (including the "separate business entity" test) automatically are considered "contractors." They are subject to the FPA regarding any workers they may hire.

How does someone qualify as a "separate business entity"?

Let's start with how someone **cannot** qualify. The law specifically says that "an individual's act of securing workers' compensation insurance with a carrier as a sole proprietor, partnership or otherwise shall not be binding on any determination" regarding employment status. In other words, having a separate workers' compensation policy does NOT make someone an independent contractor, in relation to a contractor for whom the person performs services.

Meeting the "separate business entity" test (as well as the two other elements in the three-part test shown above) is required, in order for a worker to be classified as an independent contractor. To be considered a "separate business entity," a sole proprietor, partnership, corporation or other entity must meet 12 separate criteria. The 12-part "separate business entity" test appears in the box on the next page.

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If I am a "contractor," as defined, how does the FPA affect my workers' compensation policy?

The FPA, for the first time, sets detailed standards for determining whether an individual working in the construction industry should be classified as an employee or an independent contractor. People whom the law considers your "employees" trigger the requirement that you provide them with workers' compensation benefits if they are injured on the job.

The FPA's strong presumption of employment, when applied to workers currently performing services for you, may lead you to conclude that more individuals should be classified as your "employees." Here are a few possible results that could flow from a reassessment of these relationships.

1. **Protection from lawsuits.** In ge… employees cannot sue their employe… for on-the-job injuries. To the extent someone now clearly…ssifies as an employee, the pe… may be shielded and… limited to seeki… its … workers' compens…

2. **Workers' compensa… p…** …tandards m… …tion of worker… …isation claims inv… …nstru… …rk. It's p… …ers… …able … you… worke… …ation po… …an in the past. …s, in turn, co… …ect yo… loss experi…

3. **Re… …e reclassification of workers.** The FPA presumption of employment means that relationships with parties who provide services for you in your construction business should be reviewed. If you decide to reclassify anyone based on this review, this could affect the payroll you report for purposes of workers' compensation, and possibly the workers' compensation code(s) used to rate your policy. Going forward, keep in mind the FPA's stringent criteria when classifying new workers.

4. **Reassessment by your workers' compensation carrier.** Standards set by the FPA may alter insurers' approach when auditing your payroll figures and determining your premiums, especially if it's likely the policy may have to protect more individuals as your "employees." Remember, simply requiring someone to show evidence of having a separate workers' compensation policy does **not** mean the person cannot be considered your employee. To avoid the inclusion of remuneration from such contracted work, you need to know what the insurer will accept as evidence of an independent contractor relationship in lieu of a certificate of workers' compensation insurance.

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 fre… the direction or control over t… means and manner of providing … service subject only … of the contractor t… …d result;
2. not be su… …cellati… …n its work w… …us;
3. h… …bstanti… …r of … e entity … …linary …ment a… …l …;
4. ow… …rapi… …nd gain the pro… …bear… …of the …
5. m… … available to the ge… …ublic … business …mmunity on … regular basis;
6. … …e the services provided on a …deral income tax schedule as an inde…endent business;
7. p… …ery… …er the enti…
8. obtain a… …y re… license or pe… name;
9. furnish the to… an… …quipment necessary … …e the service;
10. … …mployees without …pproval, pay the …s without reimbursement …e 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; and
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.

What is the posting requirement?

The FPA requires contractors to notify workers of its provisions by posting them in a prominent and accessible place on the job site. The New York State Department of Labor has developed a poster for contractors to use in fulfilling the notice provision. You can access it at the department's website by searching for the "Fair Play Act."

For questions about workers' compensation insurance, please feel free to contact our agency at any time.