

In July Governor Corzine and New Jersey's Supreme Court delivered a one-two punch to New Jersey businesses that misclassify employees as independent contractors.

On July 13, 2007 Governor Corzine signed into law new penalties that will apply to construction industry employers that misclassify their employees as independent contractors. The Construction Industry Independent Contractor Act applies to all companies that perform construction work in New Jersey, including subcontractors and lower tier contractors. The Act creates a presumption that workers performing construction services for a business in New Jersey are its employees. The business can rebut this presumption only by establishing that (1) the worker has been and will continue to be free from the company's control or direction as to how the services are performed, (2) the services are either outside the usual course of business of the company for which the services are to be performed or are performed "outside of all the places of business of the employer for which the service is performed," and (3) the worker is customarily engaged in an independently established trade, occupation, profession, or business. A company engaged in the construction industry in New Jersey violates the Act by classifying its workers as independent contractors unless it establishes that the worker meets each of these three requirements. If the company misclassifies a worker as an independent contractor and fails to pay wages, benefits, payroll taxes or other contributions as required by state and federal law, the company may be charged criminally. Criminal penalties under the Act include fines ranging from \$100 to \$1000 per offense and imprisonment for terms ranging from 10 to 90 days. A company found to have knowingly violated the Act can be debarred for up to three years from construction contracts on public works in New Jersey. The Labor Commissioner has power to suspend a contractor's registration and issue stop work orders that stop all business operations at the site of the violation against any successor corporation or business entity that has a principal officer(s) in common with any company found in violation of the Act. Other penalties include making the worker whole for any unpaid wages, benefits and payroll taxes and civil penalties of \$5000 per day of work in violation of a stop work order and \$5000 per misclassified worker. Enforcement actions can be initiated by a construction worker as well as a labor union.

Also in July, in a case titled *D'Annunzio v. Prudential Insurance Company*, the state Supreme Court made it more difficult for New Jersey employers to defend against suits by independent contractors under New Jersey's whistle-blower law, which on its face protects employees only. The Court held that a part-time worker for Prudential, who performed services under a standard professional services agreement that described his status as independent contractor, could state a claim against Prudential under the Conscientious Employee Protection Act (CEPA) on the grounds that he was under the company's control and his work was "an essential aspect" of and "functionally integrated" into Prudential's regular business. Among the features of the Prudential work environment that influenced the Court to finding that Mr. D'Annunzio was an employee were his daily role in Prudential's claims processing work, his "ready availability" to Prudential employees, the Prudential nameplate on his cubicle, his Prudential phone number, e-mail address, and office mailbox and his use of Prudential office supplies. From these and other facts the Court found that Prudential had the right to control the manner and means of his job performance, supervised him closely, furnished his equipment and workplace and terminated the work relationship. The Court further justified its expansion of CEPA's reach to independent contractors on the basis of adjusting "for the modern reality" of a business world in which professionals perform their services for remuneration pursuant to a contract instead of wages and benefits.

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