

**NEW PENNSYLVANIA LAW SUBSTANTIALLY CHANGES THE RULES
REGARDING THE USE OF INDIVIDUALS AS INDEPENDENT
CONTRACTORS IN THE CONSTRUCTION INDUSTRY**

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The **Construction Workplace Misclassification Act** (“Misclassification Act”), which was signed into law October 13, 2010 by Governor Rendell and becomes effective 120 days thereafter, on February 10, 2011, strictly regulates the use in Pennsylvania of individuals as independent contractors in the residential or commercial construction industry. It, as a practical matter, changes the traditional concept of weighing factual circumstances under what many PBA Members know as the “IRS Test” or the “ABC Test.” Under the new law it is still necessary to analyze and weigh on a case-by-case basis detailed facts about how much control the hiring party has over the individual, but on top of that there is now an additional specific list of “must haves.”

Under the new law, an individual who is engaged to perform services for remuneration in the construction industry will be automatically treated as an employee of the construction business engaging the individual, and not as an independent contractor, for Pennsylvania workers’ compensation and unemployment compensation purposes unless (1) the individual is free from the hiring party’s control or direction over the performance of the services (which will still require a case-by-case analysis of facts) and (2) all of the following requirements are also satisfied:

1. There is a written independent contractor agreement between the hiring party and the individual.
2. The individual possesses the essential tools necessary to perform the services.
3. The arrangement between the hiring party and the individual is structured so that the individual may realize a profit or suffer a loss from the engagement.
4. The individual has an ownership interest in his or her business that is contracted to perform the services for the hiring party.
5. The individual must have a physical business location separate from the hiring party’s location.
6. The individual must have either previously performed the same types of services for other parties or must hold himself out to other potential customers as being able and available to perform such services.
7. The individual must maintain for the duration of the contract liability insurance of at least \$50K.

The hiring party business, and its officers and agents, may be civilly liable, may face criminal prosecution, and may be subject to stop work orders on projects for misclassifications of employees as independent contractors in violation of the new law.

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