



Prevailing Wage & Independent Contractor Updates for the IL Transportation Industry...

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On November 1, 2022, SmithAmundsen and Davis I Kuelthau formally combined to form Amundsen Davis, LLC, a full service business and litigation law firm helping clients across the U.S.



PREVAILING WAGE UPDATES

7 Basic Rules Re: PW – Generally



7 basic rules for anyone dealing with construction projects that are financed, owned, controlled or benefiting (in whole or in part) a local, state or federal government agency or body:

1. Know your legal obligations under any and every local, state or federal prevailing wage ordinance/law that applies to your business (note: what's permissible under Federal Davis-Bacon may be unlawful under the Illinois Prevailing Wage Act);
2. Ensure your business is complying with all applicable prevailing wage obligations for every worker, every day, every week, every job and utilize the certified transcript of payroll form required by the government agency or body at issue (i.e. don't use the DBRA CTP form for local or state projects);
3. Never allow a prevailing wage audit or investigation to be closed or remain in limbo without some document that confirms your full compliance with your legal obligations (note: you may have to do this yourself by letter to the auditor or agency at issue);
4. Never sign any settlement agreement concerning prevailing wage issues without first reviewing it with competent legal counsel to help ensure that no admission of liability or guilt is made and to expressly state that you are free and clear to bid and perform future public construction work;
5. Educate your local units of government on who you are and highlight your good name and business reputation — get to know the public officials, get involved and form business relationships;
6. Review your purchase orders, bid specifications and contracts to incorporate necessary prevailing wage notice obligations as well as certain disclaimers to ensure proper and/or mandatory notice obligations are in place; and
7. Don't rely entirely on a governmental agency's internal staff or published FAQ's or interpretive guidance on prevailing wage obligations — some are flat-out wrong and some don't necessarily supply the most accurate information needed.

Introduction



- The Illinois Prevailing Wage Act (IPWA) has been adjusted through legislation; numerous times. So...
- Compliance with the IPWA has been a moving target and liability is assessed notwithstanding good faith efforts to comply.
- Competition for public works projects increased significantly during the economic decline, which increased prevailing wage complaints.
- Striking the balance between remaining competitive for public works projects and compliant with the IPWA requires a keen understanding of the developing prevailing wage laws.
- The Illinois Department of Labor (IDOL) has placed more emphasis on technical compliance and the statutory amendments allow broader authority to enforce the technical aspects of the IPWA.
- The certified transcript of payroll is different for Illinois and federal prevailing wage projects.
- IL PW law vs. Federal PW law = Different!

IPWA... When Applicable???



- The IPWA does not apply to federally-funded projects covered under federal prevailing wage law (i.e. Davis-Bacon Act and Related Acts).
- Non-public bodies that receive and/or are supported by State funding can be deemed a “public body” under the IPWA and “construction work” performed for such non-public entities might be covered by the IPWA.
- It is possible payment of prevailing wages may be required as a material term of a construction contract (i.e. shall pay/report vs. shall pay/report IF scope of work falls under the IPWA).

IPWA – Not Applicable When???

- Pure management/supervision;
- Shop work;
- Transport of supplies/materials on behalf of the material supplier/manufacturer;
- Non-construction related lawn maintenance;
- Inspection or testing (not part of repair or installation);
- Estimating.



Sales Rebates?



- **Are construction projects financed in whole or in part by Sales Tax Rebates covered by the Prevailing Wage Act?**
- No, a Sales Tax Rebate is not considered a bond, grant, loan, or other funding made available by or through the State or any of its political subdivisions, and does not make the project a public work subject to the Prevailing Wage Act. As long as no other funds used for construction are public in nature, the Prevailing Wage Act does not apply. **PER IDOL.**

TIF's?



- **Are projects funded through TIF financing covered by the Act?**
 - Funds received from Tax Increment Financing (TIF) do not qualify as “public funds”. A private project that is funded by means of TIF financing, whether via credits, reimbursement of eligible expenses through a TIF, or direct payments from the TIF, is not covered by the Prevailing Wage Act unless it also receives funding from another source which does qualify as public funds. However, if a project is undertaken by a public body, whether it is a governmental body or an institution supported in whole or in part with public funds, it will be subject to the Act. **PER IDOL.**

PACE Funds?



- **Are projects funded through PACE financing covered by the Act?**

- Projects that receive funds from a PACE financing qualify as “public works.” A private project that is funded by means of PACE financing through the issuance of PACE bonds by a governmental unit or the Illinois Finance Authority are covered by the Prevailing Wage Act.
- Similarly, interim financing of a private project secured by one or more assessment contracts under the PACE Act is covered by the Prevailing Wage Act because the loans or other funds are made available by or through the governmental unit’s execution of the applicable assessment contracts. However, a PACE refinancing is a financial transaction and not public works. A contractor or subcontractor is not required to pay the prevailing wage on any work performed prior to the recording of an assessment contract under the PACE Act. **PER IDOL.**

IPWA: Contractor Requirements



1) PAY THE PREVAILING WAGE (HOURLY PLUS ANNUALIZED FRINGES)

- set by the IDOL – interpreted by the IDOL.

2) POST PREVAILING WAGE RATES AT THE WORKSITE

- IDOL is focused on technical compliance and is actively requesting proof of compliance with this component.

3) SERVE NOTICE ON LOWER TIERED CONTRACTORS

- must be written notice.

4) MAINTAIN, PRESERVE AND SUBMIT ACCURATE RECORDS

- for 5 years from last day paid on the project...

- keep records of employee daily start and stop times (non-PW too!)

5) SUBMIT CERTIFIED PAYROLLS TO IDOL – THROUGH ONLINE PORTAL

- **contractor must do for its own workers (do not contract away).**

6) ESTABLISH DRUG/ALCOHOL ABUSE TESTING PROGRAMS

- Substance Abuse Prevention on Public Works Projects Act; union CBAs with any drug testing component are exempt, but non-union contractors MUST have 9-panel testing in place.

PW Rate – Miscellaneous Example



- **Classification XYZ (ABC County, IL)**

- Base Hourly Wage = \$43.72
- Foreman Base Hourly Wage = \$44.47
- Health and Welfare = \$14.99 per hour ***BASED ON ACTUAL HOURS WORKED (PW & NON-PW) OR 2,080 HOURS.
- Pension = \$13.61 per hour ***INCLUDES ANY RETIREMENT CONTRIBUTION --- PAY FOR PW HOURS ONLY SHOULD BE OKAY, PROVIDED THERE IS IMMEDIATE VESTING.
- Training = \$0.90 per hour ***US DOL APPRENTICESHIP TRAINING.
- Vacation = ??? (Maybe and Maybe NOT) – depends!
- Overtime of 1.5 applies to all PW hours worked over 8 in a day, and all hours worked on Saturday.
- Overtime of 2.0 applies to all PW hours worked on Sunday and all hours worked on recognized holidays.

Travel



- Worker driving to a PW job from the “shop” or “yard” or from another job during the day = ON THE CLOCK – and IF transporting materials, tools or equipment to the job or from the job, then must pay PW drive time.

Ascertaining PW Rates in IL



- The prevailing rate of wages paid to individuals covered under this Act shall not be less than the rate that prevails for work of a similar character on public works in the locality in which the work is performed under collective bargaining agreements or understandings between employers or employer associations and bona fide labor organizations relating to each craft or type of worker or mechanic needed to execute the contract or perform such work, and collective bargaining agreements or understandings successor thereto, provided that said employers or members of said employer associations employ at least 30% of the laborers, workers, or mechanics in the same trade or occupation in the locality where the work is being performed. – **ESTABLISHED BY IDOL (DB is now similar)**

Ascertaining PW Rates in IL



- The rates published by IDOL almost always apply. The applicable rates can be found at: <https://www2.illinois.gov/idol/Laws-Rules/CONMED/Pages/Rates.aspx>
- Each Illinois county has its own rates for specific job classifications.

Enforcement



- The Illinois Department of Labor (IDOL) is charged with enforcing the IPWA.
- The system is “complaint driven.”
- IDOL will issue information and document requests to contractors and the public body when investigating a project.
- IDOL has subpoena power, which can be enforced in the courts.
- The IPWA also allows a private right of action.

WARNING



- **There is no filter or pre-complaint intake process at the IDOL concerning prevailing wage complaints. The IDOL must investigate each and every complaint filed.**
- **There is no requirement that a complaining party demonstrate an actual violation of law has occurred or submit the complaint under penalty of perjury or simply attest that the complaint is truthful.**
- *I've seen some really messed up "stuff"....*

Certified Transcript of Payroll



Certified Transcript of Payroll Portal

- Pursuant to PA 100-1177 and 820 ILCS 130/5.1, the Illinois Department of Labor is charged with developing and maintaining an online portal for prevailing wage construction contractors to file their certified payrolls with the department.
- You may access the portal here: [Certified Transcript of Payroll Portal](#)
- **Please check IDOL's website for any updates.**
- May 6th Update - When you submit your certified payroll, you will now receive a .pdf copy of your submission with the email certification from IDOL.
- August 18th Update - The option to import your payrolls is now available. Proceed to the portal to review the template.
- **September 1st – All work performed on new and existing projects must be submitted to IDOL through the certified transcript of payroll portal.**

New Davis Bacon & Related Acts – FINAL RULE (10-23-23)



- Federally funded projects that involve construction work in excess of \$2,000, will trigger Davis-Bacon obligations.
- Under the new rule, “construction” is being greatly expanded in ways that will trigger federal prevailing wage obligations that were never contemplated before. Additionally, the prevailing wage rate (hourly base plus fringe benefits) will now be tied to the area-wide union collective bargaining agreement --- therefore, taxpayers should see about a 30% increase in labor costs tied to such projects from what they are now and what they will be under the new rule. Labor costs will also increase annually in ways that were not felt before through automatic rate escalators. And, while the new rule is aimed to assert union area-wide agreements into setting the prevailing wage rate, the U.S. DOL will also rely solely on local union input on what is covered work, what trade/job classification should be performing specific tasks on a particular project, and what hourly rates and fringe benefits must be applied to the unique project.

New Davis Bacon & Related Acts – FINAL RULE (10-23-23)



- Some of the more noteworthy highlights of the changes taking effect on October 23, 2023 include:
 - Prevailing wage rates can now be set through the local area-wide union CBA (so long as the union makes up at least 30% of the work performed in the local area).
 - Rates established in urban areas can be applied to rural areas where rate data is deemed by the U.S. DOL as “not sufficient”.
 - The U.S. DOL may adopt local or state prevailing wage determinations where and when the U.S. DOL thinks the local or state methodology is in line with the U.S. DOL’s methodology (this will likely revert to the rates established through the area-wide union contract).
 - Automatic adjustments to rates can and will be made based on the U.S. Bureau of Labor Statistics Employment Cost Index data.
 - **Material Supplier Exemption Changes: transportation of supplies and material onto a project site (even by or through the supplier) may trigger prevailing wage obligations if the driver is on the site for more than a “de minimis” amount of time.**
 - Off-site fabrication (aka shop work) may be subject to prevailing wage obligations if the work is solely dedicated to a Davis-Bacon job.

New Davis Bacon & Related Acts – FINAL RULE (10-23-23)



(cont'd)

- Green Energy Projects of various sorts will be subject to Davis-Bacon mandates (i.e. simple installation of solar panels, broadband and electric car chargers).
- Demolition work and related site preparation work will now be covered.
- Installation of equipment into a building will fall under the Davis-Bacon.
- Site and material surveyors will be deemed laborers (covered) and not professionals (who are not covered).
- Flagging work done off site will be deemed covered work.
- Contractors working outside the locality in which their apprenticeship program is registered must follow the ratio and wage rate standards in the locality where the project is taking place --- unless there is not registered program in that outside locality.
- Limits now placed on fringe benefit credits taken for contributions made to an apprenticeship program.
- Requiring an annualization of fringe benefits (resulting in non-union contractors having to apply benefits over ALL hours worked vs. paying the applicable fringe benefits for the Davis-Bacon hours only).

New Davis Bacon & Related Acts – FINAL RULE (10-23-23)



(Cont'd)

- Self-funded insurance programs must be approved by the U.S. DOL in order to use such programs as a credit to meet the fringe benefit component (however, there is no approval needed for retirement plans that are defined contribution plans with 100% immediate vesting or for union pension plans).
- Subcontractors (in addition to the Prime) are now liable for penalties and violations (and, even if they receive no notice that Davis-Bacon applied to the project).
- Harsher debarment penalties and much easier for the U.S. DOL to debar contractors and primes from future Davis-Bacon projects.
- New Anti-Retaliation provisions and related penalties.
- New paperwork and related reporting burdens.
- More serious criminal penalties to seek and secure.
- Interest to now accrue on any back wage assessment.

New Davis Bacon & Related Acts – FINAL RULE (10-23-23)



- The U.S. DOL has published a side-by-side comparison of the “old” rule vs. the “new” rule. Construction industry developers, financiers, contractors of all levels and associated vendors/suppliers should carefully review this summary [available on the DOL website](#). Let’s review in more detail.

Transportation Issues-Summarized



*Transportation of material or supplies directly for a bona fide MATERIAL SUPPLIER or MANUFACTURER is NOT covered. HOWEVER... Prevailing wage requirements apply if/when such drivers spend a significant amount of time working on a project site and do more than merely arrive at, load and unload on, and leave from the project site. The question lies in whether the work performed is more than *de minimis*.

**Transportation of material or supplies for a contractor or for a business performing work on the project (not the material supplier or manufacturer) is covered PW work.

***Truck drivers moving materials and supplies at *multiple* locations on a project site (transport materials from one area to another *within* a project site or move materials between an adjacent stock-pile or facility used for prefabrication purposes and a project site) will be required to comply with PW mandates.

****Even when truckers are not subject to prevailing wage requirements, they may still need to be disclosed on Certified Payroll Reports to maintain Davis-Bacon Act compliance. IL does not require this.

*****What about Owner-Operators?? The feds are looking to try and bring in bona fide owners who transport (drive a truck) onto a DB project and perform “work” for more than a *de minimis* amount of time on the site (i.e. physically unloading on the job site or driving from point A to point B on the job site). Of course, IL has pretty much already administered its PW law this way for years.

Interplay with Local/State PW Laws



- NOTE: Remember, state prevailing wage laws (i.e. CA, IL, MI, OH, NY) vary greatly and are quite unique. What you know about CA prevailing wage law will not help you when complying with IL's law and vice versa. Also, state prevailing wage compliance is much different than federal Davis-Bacon compliance. It is imperative that those operating in the construction industry become intimately familiar with the plethora of state and federal prevailing wage mandates applicable to their operations. Every project should be closely reviewed and examined --- on its own --- as what may be required will likely be truly unique for that specific project.

Suing Employers for PW Violations – When Employer Does Not Have Notice of PW Coverage



- On June 9, 2023, Governor Pritzker signed into law HB 3491 which amends the Illinois Prevailing Wage Act (IPWA) to provide workers with the following rights against general contractors and sub-contractors:
 - Any laborer, worker, or mechanic who is employed by the contractor or by any lower tier sub-contractor and is paid for services in a sum less than the prevailing wage rates for work performed on a [prevailing wage] project shall have a right of action for whatever difference there may be between the amount so paid and the prevailing rates required to be paid for work performed on the project.
- Effective January 1, 2024, any worker, laborer or mechanic performing construction work on a prevailing wage project can file a private cause of action against the employer for any differential between what was paid and what was required to be paid to them pursuant to the IPWA.

Suing Employers for PW Violations – When Employer Does Not Have Notice of PW Coverage



- This legislation was created in order to reverse the Illinois Supreme Court’s 2021 decision in Valerio, et. al. v Moore Landscapes, LLC --- where the IL Supreme Court upheld the dismissal of private lawsuit filed by a group of employees against the employer for not paying them prevailing wage because the employer never received clear notice that the IPWA applied to the underlying project. **To be clear, this new legislation doesn’t distinguish between the scenario whereby the employer purposely didn’t pay its employees the mandated prevailing wage rate and the one (which occurs way more often than you would think) where the employer didn’t know prevailing wage was required to be paid for the work at issue.** In other words, even when the employer doesn’t receive actual written notice that they are performing work on a prevailing wage project --- which is required under the IPWA --- they are nonetheless liable in a civil lawsuit brought by their employees for failing to pay the proper prevailing wage.

Suing Employers for PW Violations – When Employer Does Not Have Notice of PW Coverage



- In light of this new law, all contractors need to be intimately familiar with Illinois' prevailing wage mandates and must be more vigilant to ensure the application of all requirements under the IPWA are met for the work performed. Of course, there are many projects where the employing contractor is not notified that the IPWA applies to the work to be performed. That doesn't appear to matter anymore. Therefore, contract indemnity provisions and/or other contractual terms must be carefully inserted into Illinois construction contracts in order to try and alleviate the hidden financial burdens placed on construction work --- because you just don't always know if the IPWA applies to the contracted work performed.

Is it PW?? Removing & Disposing of Community “Poop” to a Private “Toilet”



- HB2845 amends the IL Prevailing Wage Act (IPWA) to expressly include “the removal, hauling, and transportation of biosolids, lime sludge, and lime residue from a water treatment plant or facility and the disposal of biosolids, lime sludge, and lime residue removed from a water treatment plant or facility at a landfill” as covered work. The amendment passed the Illinois House and Senate recently and upon the signature of Governor Pritzker (which will happen any day now), it will become law sometime this summer.
- In addition to covering work that has no rational or reasonable relationship to actual “construction,” another major consequence of the amendment is that for the first time ever the IPWA will specifically cover private work performed away from any public construction project, facility or work site. In other words, HB2845 will require work performed at a private landfill --- located away from a public construction project, facility or work site --- to be paid at the prevailing wage rate covered by the applicable area wide union contract. Additionally, for the first time ever, HB2845 will also require the hauling and transportation of non-construction materials (i.e. human waste) to be covered work under the IPWA.

Is it PW?? Removing & Disposing of Community “Poop” to a Private “Toilet”



- Through HB2845, Illinois will now mandate the application of union area-wide construction contracts’ wage and benefit scales to be paid on work that:
 - has nothing at all to do with construction work;
 - is performed on purely private land for a purely private purpose (i.e. farming); and
 - involves the hauling and transportation of non-construction materials.
- HB2845 was a test balloon. Contractors, public bodies, developers, elected officials and taxpayers throughout Illinois should brace for additional prevailing wage legislation (which will undoubtedly become law) with the purpose of mandating union contractual terms onto otherwise private work or projects that have nothing to do with actual construction.

Sample Indemnity Provision



- XXX Company's [work performed/services performed] shall be based on its understanding through the actions, statements and/or omissions of ZZZ Corp. that this project [identify] and the work performed relating thereto is not subject to prevailing wage requirements (federal, state or local). If XXX Company's understanding is incorrect, ZZZ Corp. agrees and acknowledges that it shall immediately notify XXX Company in writing within forty-eight (48) hours from receiving this notice so that XXX Company may submit a revised proposal and/or invoice reflecting the additional costs associated with applicable prevailing wage laws. If at any time it is determined that this project is or was subject to prevailing wage requirements under federal, state or local law, then ZZZ Corp. agrees and acknowledges that it shall reimburse and make whole XXX Company for any back wages, penalties and/or interest owed to its employees or any other third party, including any appropriate governmental agency. ZZZ Corp. also agrees that prices, costs and/or applicable fees will also be increased prospectively as required by the increase in wage payments to XXX's Company's employees. ZZZ Corp. understands and acknowledges that it shall notify XXX Company of any prevailing wage requirements or obligations under applicable laws relating to the work or services performed by XXX Company. ZZZ Corp. also agrees to indemnify and hold XXX Company harmless from any error, act or omission on its part with regard to prevailing wage notification that causes any claim, cause of action, harm or loss upon XXX Company, including but not limited to prompt reimbursement to XXX Company of any and all back wages, penalties and/or interest owed to its employees or any other third party, including reasonable attorneys' fees and costs associated with such claim, cause of action, harm or loss.



INDEPENDENT CONTRACTOR UPDATES

Independent Contractor Test



This law **presumes that an individual performing work for a construction contractor is an employee unless all** of the following three criteria are met:

- (i) The individual is free from control and direction over the performance of the contract; **and**
 - (ii) The service performed is outside the usual course of business of the contractor; **and**
 - (iii) The individual is an independently established trade, occupation, profession, or business.
- If a company “fails” just one of the three parts, the independent contractor is reclassified to employee status and the company has the resulting liability, which can be very serious!

IL ECA and Individual Contractors



- **SOLE PROPRIETOR/PARTNERSHIP EXCEPTION:** There is an exception to this three-part test. Under the Employee Classification Act, legitimate sole proprietors or partnerships are excluded. To determine if the individual in question is a “legitimate” sole proprietor or partnership, **there is a detailed 12-factor test that must be met.**
- **VIOLATIONS:** The Employee Classification Act authorizes the Illinois Department of Labor to enforce this very strict law. The Employee Classification Act authorizes the Illinois Department of Labor to assess **penalties** of up to \$1,500 for each violation found in a first audit by the Department and up to \$2,500 for each repeat violation found by the Department within five years. **For any second or subsequent violations within five years, the Illinois Department of Labor will bar the employer from receiving any state contracts for four years.**

The “3-Part/ABC Test” In Detail



An individual (i.e. alleged independent contractor) performing services for a contractor (i.e. Company) is deemed to be an employee (i.e., **presumption of employee status!**) of the contractor (i.e., Company) unless it is shown that:

- **PART 1:** the individual (i.e. alleged independent contractor) has been and will continue to be **free from control or direction** over the performance of the service for the contractor (i.e. Company), both under the individual's contract of service and in fact; **AND**
- **PART 2:** the service performed by the individual (i.e. alleged independent contractor) is **outside the usual course of services** performed by the contractor (i.e. Company); **AND**
- **►Note:** Depending on how aggressive the Agencies and the Courts are on Part 2 (course of business), your Company may automatically fail this second prong of the “three part test” because your company is generally in construction and the person you use (i.e. alleged independent contractor) is generally in construction. This interpretation would make no logical sense, and actually conflict with the legislative history on this issue. But... we simply do not know for certain how the IDOL or the courts will interpret this provision.
- **PART 3:** the individual (i.e. alleged independent contractor) is engaged in an **independently established** trade, occupation, profession or business.



The “12-Part Test” In Detail

Under the Employee Classification Act, legitimate sole proprietors or partnerships are excluded. Therefore, to determine if the individual in question is a “legitimate” sole proprietor or partnership, **there is a detailed 12-factor test that must be met.** Remember -- all 12 parts must be met!

- **PART 1 of 12:** the sole proprietor or partnership (i.e. alleged independent contractor) is performing the service **free from the direction or control over the means and manner of providing the service**, subject only to the right of the contractor (i.e. Company) for whom the service is provided to specify the desired result; AND
- **PART 2 of 12:** the sole proprietor or partnership (i.e. alleged independent contractor) is not subject to **cancellation or destruction** upon severance of the relationship with the contractor (i.e. Company); AND
- **PART 3 of 12:** the sole proprietor or partnership (i.e. alleged independent contractor) has a **substantial investment of capital** in the sole proprietorship or partnership beyond ordinary tools and equipment and a personal vehicle; AND
- **PART 4 of 12:** the sole proprietor or partnership (i.e. alleged independent contractor) owns the capital goods and **gains the profits and bears the losses** of the sole proprietorship or partnership; AND



The “12-Part Test” In Detail

- **PART 5 of 12:** the sole proprietor or partnership (i.e. alleged independent contractor) makes its **services available to the general public** or the business community on a continuing basis; **AND**
- **PART 6 of 12:** the sole proprietor or partnership (i.e. alleged independent contractor) includes **services rendered on a Federal Income Tax Schedule** as an independent business or profession; **AND**
- **PART 7 of 12:** the sole proprietor or partnership (i.e. alleged independent contractor) performs services for the contractor (i.e., Company) **under the sole proprietorship’s or partnership’s name; AND**
- **PART 8 of 12:** when the services being provided require a license or permit, the sole proprietor or partnership (i.e. alleged independent contractor) **obtains and pays for the license or permit** in the sole proprietorship’s or partnership’s name; **AND**

The “12-Part Test” In Detail



- **PART 9 of 12:** the sole proprietor or partnership (i.e. independent contractor) furnishes the tools and equipment necessary to provide the service; AND
- **PART 10 of 12:** if necessary, the sole proprietor or partnership (i.e. independent contractor) hires its own employees without contractor (i.e. Company) approval, pays the employees without reimbursement from the contractor (i.e., Company) and reports the employees’ income to the Internal Revenue Service; AND
- **PART 11 of 12:** the contractor (i.e. Company) does **not** represent the sole proprietorship or partnership (i.e. independent contractor) as **an employee** of the contractor to its customers [**tip: check your website, applications, and all printed material!**]; AND
-
- **PART 12 of 12:** the sole proprietor or partnership (i.e. independent contractor) has the right to perform similar services for others on whatever basis and whenever it chooses [**tip: no non-compete!**].

Businesses Covered



- The Employee Classification Act applies to construction and construction-related companies (including trucking companies) who use independent contractors in construction and construction related jobs. Under the Act's language, "construction" means:

1. Any constructing;
2. Any altering;
3. Any reconstructing;
4. Any repairing;
5. Any rehabilitating;
6. Any refinishing;
7. Any refurbishing;
8. Any remodeling;
9. Any remediating;
10. Any renovating;
11. Any custom fabricating;
12. Any maintenance;
13. Any landscaping;
14. Any improving;
15. Any wrecking;
16. Any painting;
17. Any decorating,
18. Any demolishing;
19. Adding to or subtracting from any building, structure, highway, roadway, street, bridge, alley, sewer, ditch, sewage disposal plant, water works, parking facility, railroad, excavation or other structure, project, development, real property or improvement or to do any part thereof; and
20. Construction shall also include moving construction-related materials on the jobsite to or from the jobsite.

Administration, Enforcement and Penalties through the IL DOL



ANNUAL REPORTING REQUIREMENT: Any contractor for which either an individual, sole proprietor, or partnership is performing construction services shall report all payments made to that individual, sole proprietor, or partnership if the recipient of payment is not classified as an employee. The report shall be submitted electronically to the Illinois Department of Labor annually on or before April 30 following the taxable year in which the payment was made.

INDIVIDUAL LIABILITY: In addition to an individual who is an employer, any officer of a corporation or agent of a corporation who knowingly permits such employer to violate the provisions of the Act may be held individually liable for all violations and penalties assessed under the Act. This shall not apply to an individual who is an officer or agent of a corporation which on the project under investigation satisfies the responsible bidder requirements set forth in the Illinois Procurement Code.

Third Party and Interested Party Lawsuits



An interested party or person aggrieved by a violation of this Act or any rule adopted under this Act by an employer or entity may file suit in circuit court, *in the county where the alleged offense occurred or where any person who is party to the action resides*, without regard to exhaustion of any alternative administrative remedies provided in this Act. Actions may be brought by one or more persons for and on behalf of themselves and other persons similarly situated. A person whose rights have been violated under this Act by an employer or entity is entitled to collect:

1. The amount of any wages, salary, employment benefits, or other compensation denied or lost to the person by reason of the violation, plus an equal amount in liquidated damages;
2. Compensatory damages and an amount up to \$500 for each violation of this Act or any rule adopted under this Act;
3. In the case of unlawful retaliation, all legal or equitable relief as may be appropriate; and
4. Attorney's fees and costs.

NOTE: The right of an interested party or aggrieved person to bring an action under this Section terminates upon the passing of three (3) years from the final date of performing services to the employer or entity. This limitations period is tolled if an employer or entity has deterred a person's exercise of rights under this Act.

IDOL Regulations --- The “Corporation/LLC” Analysis



- **What is a Bona Fide Corporation or LLC?**

- In the “Definitions” section of the new Administrative Regulations, Section 240.110, the definition of an “*individual performing services*” (i.e., alleged independent contractor) does **not** include a bona fide corporation or bona fide limited liability company. This seems to strongly suggest that bona fide corporations and LLC’s would not be considered potential employees under this new law. Of course, **the question remains, “What does BONA FIDE mean?”**
- “Individual performing services” does not include a *bona fide corporation* nor a *bona fide limited liability company* (LLC).

IDOL Regulations --- The “Corporation/LLC” Analysis



- In determining whether a corporation is bona fide for purposes of this Act, the Department shall consider, among other factors, whether:
 - The corporation is capitalized;
 - The corporation has issued corporate stock;
 - The corporation maintains a corporate bank account;
 - There is an intermingling of corporate and personal accounts or funds;
 - The corporation holds itself out as a corporation;
 - The corporation maintains corporate books and records, including corporate meeting minutes and files corporate tax returns that are current and complete; **and**
 - Articles of Incorporation have been filed and the corporation is in good standing, in the case of Illinois corporations, with the Illinois Secretary of State or, in the case of foreign corporations, as directed by the laws of that jurisdiction.

IDOL Regulations --- The “Corporation/LLC” Analysis



- In determining whether a **limited liability company** (LLC) is bona fide for purposes of the Act, the Department shall consider, among other factors, whether:
 - The LLC has assets;
 - The LLC maintains a company bank account;
 - There is an intermingling of company and personal accounts or funds;
 - The LLC holds itself out as an LLC;
 - The LLC makes necessary tax filings that are current and complete; **and**
 - Articles of Organization have been filed and the LLC is in good standing. In the case of Illinois LLC’s with the Illinois Secretary of State or, in the case of foreign LLC’s, as directed by the laws of that jurisdiction.
- Notice that the definition uses the phrase, “the Department **shall consider, among other factors,** whether:...” so we are still left with the uneasy situation where **we do not know HOW an Illinois Department of Labor auditor will actually analyze whether or not a corporation or LLC is bona fide.**

Don't Lose Sight of... IL UI Act



820 ILCS 405/212.1

Sec. 212.1. Truck Owner-Operator.

(a) The term "employment" shall not include services performed by an individual as an operator of a truck, truck-tractor, or tractor, provided the person or entity to which the individual is contracted for service shows that the individual:

***See attached



Thank you for joining us!



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