

## BULLETIN

January 11, 2011

Contact: *Mr. Richard Kaefer*  
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R.C. 2260

To: The Members of the Board

RE: New York Workers Compensation & Employers Liability Manual  
New York State Construction Industry Fair Play Act  
Independent Contractor Status

The Underwriting Committee of the New York Compensation Insurance Rating Board has authorized, and the New York State Insurance Department has approved an amendment to the New York Workers Compensation & Employers Liability Manual regarding legislation captioned above, and effective October 26, 2010, which delineates the circumstances under which an employee may be considered an Independent Contractor. The criteria embodied in the legislation has been incorporated into the NY WC & EL Manual and shown as an amendment to Rule IX, Pages 60 and 61 (as attached). Note that certain other editorial (page) adjustments were necessary within Rule IX to accommodate this change.

Please also note that the law specifies that enforcement of this legislation is the ultimate responsibility of the NYS Department of Labor (DOL) and the Workers' Compensation Board (WCB). A copy of the legislation is also attached for your reference.

These manual amendments, issued with an approved effective date of January, 1, 2011, are also included in an updated version of the New York Workers Compensation & Employers Liability Manual which is available via our website at: [www.nycirb.org](http://www.nycirb.org).

Very truly yours,

Monte Almer

President

WVT:tg  
Encl.

## 5. Assignment of Remuneration

The remuneration of sole proprietors or partners shall be assigned to classifications under the rules of this manual.

## ★ C. SUBCONTRACTORS/INDEPENDENT CONTRACTORS

### 1. Law on Contractors, Subcontractors and Owners of Timber

The New York Workers' Compensation Law provides that contractors shall be responsible for payment of benefits to employees of uninsured subcontractors. It further provides that owners of timber other than farm lands shall also be responsible for payment of benefits to employees of uninsured contractors or uninsured subcontractors.

### 2. Coverage

This statutory responsibility is automatically insured by the Standard Policy issued to the contractor or owner of timber.

### 3. Premium for Uninsured Subcontractors

- a. The contractor shall furnish satisfactory evidence that the subcontractor had workers compensation insurance in force covering the work performed for the contractor. For each subcontractor for which such evidence is not furnished, the additional premium to be charged on the policy which insured the contractor shall be the premium computed by assigning the appropriate classification to the entire payroll expended by the subcontractor for the subcontracted work. For the purpose of this rule the appropriate classifications shall be those which would apply to the subcontractor's operations had only such operations been insured in a separate policy.
- b. The contractor shall provide a complete payroll record of the employees of each uninsured subcontractor for purposes of establishing the appropriate premium. If the contractor does not supply the payroll records of its subcontractor, premium shall be determined as follows:
  - (1) 33 1/3% of the subcontract price shall be considered payroll if the subcontract is for mobile equipment with operators (such as but not limited to earth movers, graders, bulldozers or log skidders).
  - (2) 50% of the subcontract price shall be considered payroll if the subcontract is for labor and material.
  - (3) 90% of the subcontract price shall be considered payroll if the subcontract is for labor only.

#### **Exception to 3.b. above:**

In any case where investigation of a specific job discloses that a definite amount of the subcontract price represents payroll, premium shall be based on that amount.

- c. Uninsured construction subcontractors are subject to payroll limitation, as set forth in Rule V.G., when payroll is utilized for premium determination purposes. When the contract price is used in lieu of payroll records, in accordance with 3.b. above, that portion of the contract price considered as payroll shall be subject to territory differentials in accordance with Rule VI.I.
- d. **Vehicles Under Contract:** If vehicles with drivers, chauffeurs or helpers are engaged under contract and the owner of such vehicles has not furnished evidence that the workers compensation obligation has been insured, the total payroll of such drivers, chauffeurs or helpers shall be included as payroll of the insured employer which contracted for such vehicles. Such payroll shall be assigned to the classification applicable in that risk to drivers. If that payroll cannot be obtained, one-third (1/3) of the total contract price for the vehicles shall be considered as payroll of the drivers, chauffeurs or helpers.

If the owner of a vehicle under contract also is a driver who may be entitled to workers compensation benefits and has not furnished evidence that such workers compensation obligation has been insured, one-third (1/3) of the total contract price for that vehicle shall be included as payroll of the insured employer which contracted for the vehicle.

The total contract price shall include the cost of fuel, maintenance, or other services provided to the owner or owner-operator of a vehicle under contract.

- e. If an experience modification or merit rating factor has been established for the contractor, such factor shall be applied to the premium developed for the uninsured subcontractor.
- f. The above premium determination procedures shall also be applicable in the case of uninsured contractors or subcontractors engaged by owners of timber other than farm lands.

#### **4. Piece Work, Drivers, Chauffeurs and Helpers Under Contract**

This rule on subcontractors does not apply to contracts for piece work, nor to drivers, chauffeurs or helpers on vehicles engaged under contract:

- a. The entire amount paid to piece workers shall be the payroll, as provided in Rule V.B.2.g.
- b. The rules on standard exceptions apply to drivers, chauffeurs or helpers on contract vehicles.

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#### **5. Law on Independent Contractors**

The New York Workers' Compensation Law provides that an individual or worker may be considered an independent contractor, if all of the following three criteria are met:

- a. The individual is free from control and direction in performing the job, both under his or her contract;
- b. The service performed is outside the usual course of business; and
- c. The worker is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue.

These criteria are enforced by the New York Workers' Compensation Board (WCB).

### **D. AUXILIARY POLICE**

#### **1. Law and Status**

Members of an auxiliary police organization authorized by local law may be covered under a policy if a municipal corporation, pursuant to local law, elects to cover such individuals.

## 2. Coverage

Upon election, coverage may be effected by attaching the New York Inclusion of Auxiliary Police Endorsement (WC 31 03 14A).

## 3. Premium Determination

Premium shall be determined on the basis of the reasonable value of services provided by auxiliary police and assigned to Code 7720.

# E. EXCLUSION OF STATUTORY MEDICAL BENEFITS-EX-MEDICAL COVERAGE

## 1. Explanation

It is permissible to issue a Standard Policy with the provision that the insured will pay for all medical and hospital services required by law, provided that the employer is operating a properly equipped hospital or medical facility which is authorized or licensed by the New York Workers' Compensation Board. Attach the New York Medical Benefits Reimbursement Endorsement (WC 31 03 10) to such policy, and also file a copy showing the name and location of the insured and location with the New York Workers' Compensation Board.

**Note:** This coverage may not be written in conjunction with any deductible program which pertains to medical coverage with the exception of the Excess Medical Coverage Program described in Rule IX.F.

## 2. Approval Required

A carrier which intends to issue ex-medical coverage shall submit an application to the Rating Board advising us of the authorization by the Workers' Compensation Board for the furnishing of medical and hospital services by the insured. If the insured is a hospital, approval is not required.

## 3. Rates and Premium

For any location insured on an ex-medical basis, use the carrier approved ex-medical rate to compute premium for the applicable classifications.

# F. EXCESS COVERAGE FOR MEDICAL PAYMENTS UNDER EX-MEDICAL POLICIES

On any policy which provides that the employer shall comply with the statutory obligations for medical aid with respect to operations at or from a specified location, coverage for excess medical losses incurred in connection with such operations may be provided in accordance with the following rules:

## 1. Coverage

The coverage shall provide indemnification to the employer for the amount by which the medical payments actually made by the employer on any claim exceeds \$2,000 or \$5,000 or on any accident which exceeds \$5,000, \$10,000, \$15,000 or \$25,000.

## 2. Form of Endorsement

Excess medical coverage shall be provided by attaching the New York Excess Medical Coverage Endorsement (WC 31 03 03) to the ex-medical policy. A separate premium charge shall be made for this coverage.

**3. Rates**

The carrier approved rate per \$100 of payroll, or other unit of exposure for each classification, shall be calculated by multiplying the appropriate statutory medical coverage carrier authorized rate by the excess medical factor for such classification, and shall be carried out to three decimal places. Such excess medical factor shall be obtained from the Rating Board in each case.

**4. Premium**

The premium shall be determined separately from all other premium under the policy by the application of the appropriate excess medical coverage carrier approved rate to the payroll or other exposure basis for each classification. The premium developed under the New York Excess Medical Coverage Endorsement (WC 31 03 03) shall not be subject to the premium discount provisions of this manual, nor shall any experience developed under such endorsement be used in the experience rating of the risk or be included in any retrospective rating agreement which may otherwise be applicable to the policy.

**G. EXCLUSION OR MODIFICATION OF OTHER COVERAGES BY ENDORSEMENT**

**1. New York Executive Officers Exclusion Endorsement (WC 31 03 04), and New York Executive Officers Hold Harmless Endorsement (WC 31 06 03).**

If an insured has more than one carrier separately insuring its multiple corporations or locations, the use of these endorsements will permit a single premium charge to be made for each insured executive officer.

The New York Executive Officers Exclusion Endorsement (WC 31 03 04) should be used by the carrier not providing coverage to specified executive officers, when the carrier who is insuring the executive officers has attached the New York Executive Officers Hold Harmless Endorsement (WC 31 06 03) as part of its policy.

**2. New York Exclusion for Designated Officers and Employees of Fire Districts Endorsement (WC 31 06 02).**

**3. New York Non-Subject Employees Exclusion Endorsement (WC 31 03 11).**

**4. New York Liability of Municipalities to Police Officers or Paid Firefighters—Exclusion Endorsement (WC 31 03 07).**

**5. New York Exclusion for Designated Officers and Employees of Ambulance Districts Endorsement (WC 31 06 11).**

**6. New York Ambulance and Fire District Liability Exclusion Endorsement for County or Town Policies (WC 31 06 12).**

**H. DEDUCTIBLE PROGRAM**

**1. Coverage**

This medical and indemnity deductible program shall be offered to a policyholder with an estimated annual premium at inception of \$12,000 or more as part of the policy or by endorsement. Under the deductible program, the insurer pays all amounts in their entirety applicable to each compensable claim under Part One of the policy. Then, the insurer obtains reimbursement from the policyholder subject to the limits of the deductible amount for each occurrence.

## S05847 Summary:

BILL NO S05847F  
SAME AS Same as A 8237-D  
SPONSOR ONORATO  
COSPNSR FOLEY, ADDABBO, BRESLIN, KRUEGER, LARKIN, SAVINO, SCHNEIDERMAN,  
STACHOWSKI, ADDABBO  
MLTSPNSR

Add Art 25-B SS861 - 861-f, amd S511, Lab L; amd S2, Work Comp L

Enacts the "New York state construction industry fair play act"; defines terms; provides notice to persons receiving remuneration from contractors and subcontractors; describes violations; authorizes enforcement and penalties.

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## S05847 Text:

S T A T E O F N E W Y O R K

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5847--F

Cal. No. 782

2009-2010 Regular Sessions

I N S E N A T E

June 11, 2009

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Introduced by: Sens. ONORATO, FOLEY, ADDABBO, BRESLIN, KRUEGER, LARKIN, SAVINO, SCHNEIDERMAN, STACHOWSKI -- read twice and ordered printed, and when printed to be committed to the Committee on Rules -- recommitted to the Committee on Labor in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported favorably from said committee and committed to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported favorably from said committee and committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading -- again amended and ordered reprinted, retaining its place in the order of third reading -- again amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the labor law, in relation to enacting the "New York State construction industry fair play act"; and to amend the workers' compensation law, in relation to the definition of employee

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEM-

BLY, DO ENACT AS FOLLOWS:

1 Section 1. The labor law is amended by adding a new article 25-B to  
2 read as follows:

3 ARTICLE 25-B

4 THE NEW YORK STATE CONSTRUCTION INDUSTRY FAIR PLAY ACT  
5 SECTION 861. SHORT TITLE.

6 861-A. LEGISLATIVE FINDINGS AND INTENT.

7 861-B. DEFINITIONS.

8 861-C. PRESUMPTION OF EMPLOYMENT IN THE CONSTRUCTION INDUSTRY.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets  
[ ] is old law to be omitted.

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1 861-D. NOTICE TO PERSONS RECEIVING REMUNERATION FROM CONTRACTORS  
2 AND SUBCONTRACTORS.

3 861-E. VIOLATIONS AND PENALTIES.

4 861-F. RETALIATION.

5 S 861. SHORT TITLE. THIS ARTICLE SHALL BE KNOWN AND MAY BE CITED AS  
6 "THE NEW YORK STATE CONSTRUCTION INDUSTRY FAIR PLAY ACT".

7 S 861-A. LEGISLATIVE FINDINGS AND INTENT. THE LEGISLATURE HEREBY FINDS  
8 AND DECLARES THAT NEW YORK STATE'S CONSTRUCTION INDUSTRY IS EXPERIENCING  
9 DANGEROUS LEVELS OF EMPLOYEE MISCLASSIFICATION FRAUD. UNSCRUPULOUS  
10 EMPLOYERS ARE INTENTIONALLY REPORTING EMPLOYEES AS INDEPENDENT CONTRAC-  
11 TORS TO STATE AND FEDERAL AUTHORITIES OR WORKERS' COMPENSATION CARRIERS  
12 IN RECORD NUMBERS. IN ADDITION, THERE HAS BEEN AN EXPLOSION OF EMPLOYERS  
13 WHO OPERATE IN THE UNDERGROUND ECONOMY AND FAIL TO REPORT ALL OR A SIZA-  
14 BLE PORTION OF THEIR WORKERS.

15 THE LEGISLATURE HEREBY FINDS AND DECLARES THAT RECENT STUDIES OF NEW  
16 YORK CITY'S CONSTRUCTION INDUSTRY ALONE SUGGESTS THAT AS MANY AS FIFTY  
17 THOUSAND NEW YORK CITY CONSTRUCTION WORKERS -- NEARLY ONE IN FOUR -- ARE  
18 EITHER MISCLASSIFIED AS INDEPENDENT CONTRACTORS OR ARE EMPLOYED BY  
19 CONSTRUCTION CONTRACTORS COMPLETELY OFF THE BOOKS. CONSTRUCTION INDUSTRY  
20 FRAUD REDUCES GOVERNMENT REVENUE, SHIFTS TAX AND WORKERS' COMPENSATION  
21 INSURANCE COSTS TO LAW-ABIDING EMPLOYEES, LOWERS WORKING CONDITIONS AND  
22 STEALS JOBS FROM LEGITIMATE EMPLOYERS AND THEIR EMPLOYEES.

23 THEREFORE, THE LEGISLATURE HEREBY FINDS AND DECLARES THAT GOVERNMENT  
24 HAS AN OBLIGATION TO CURB THIS UNDERGROUND ECONOMY, ENFORCE LONG-STAND-  
25 ING EMPLOYMENT LAWS, ENSURE COMPLIANCE WITH ESSENTIAL SOCIAL INSURANCE  
26 PROTECTIONS AND ELIMINATE THE UNFAIR COMPETITIVE ADVANTAGE FROM CONTRAC-  
27 TORS IN THE UNDERGROUND ECONOMY BY AND THROUGH THE ENACTMENT OF THE NEW  
28 YORK STATE CONSTRUCTION INDUSTRY FAIR PLAY ACT.

29 S 861-B. DEFINITIONS. AS USED IN THIS ARTICLE:

30 1. "CONSTRUCTION" MEANS CONSTRUCTING, RECONSTRUCTING, ALTERING, MAIN-  
31 TAINING, MOVING, REHABILITATING, REPAIRING, RENOVATING OR DEMOLITION OF  
32 ANY BUILDING, STRUCTURE, OR IMPROVEMENT, OR RELATING TO THE EXCAVATION  
33 OF OR OTHER DEVELOPMENT OR IMPROVEMENT TO LAND.

34 2. "CONTRACTOR" MEANS ANY SOLE PROPRIETOR, PARTNERSHIP, FIRM, CORPO-  
35 RATION, LIMITED LIABILITY COMPANY, ASSOCIATION OR OTHER LEGAL ENTITY  
36 PERMITTED BY LAW TO DO BUSINESS WITHIN THE STATE WHO ENGAGES IN  
37 CONSTRUCTION AS DEFINED IN THIS ARTICLE.

38 3. "CONTRACTOR" INCLUDES A GENERAL CONTRACTOR AND A SUBCONTRACTOR.

39 4. "DEPARTMENT" MEANS THE DEPARTMENT OF LABOR.

40 5. "COMMISSIONER" MEANS THE COMMISSIONER OF LABOR.

41 6. "EMPLOYER" MEANS ANY CONTRACTOR THAT EMPLOYS INDIVIDUALS DEEMED  
42 EMPLOYEES UNDER THIS ARTICLE.

43 S 861-C. PRESUMPTION OF EMPLOYMENT IN THE CONSTRUCTION INDUSTRY. 1.

44 ANY PERSON PERFORMING SERVICES FOR A CONTRACTOR SHALL BE CLASSIFIED AS  
45 AN EMPLOYEE UNLESS THE PERSON IS A SEPARATE BUSINESS ENTITY UNDER SUBDI-  
46 VISION TWO OF THIS SECTION OR ALL OF THE FOLLOWING CRITERIA ARE MET, IN  
47 WHICH CASE THE PERSON SHALL BE AN INDEPENDENT CONTRACTOR:

48 (A) THE INDIVIDUAL IS FREE FROM CONTROL AND DIRECTION IN PERFORMING  
49 THE JOB, BOTH UNDER HIS OR HER CONTRACT AND IN FACT;

50 (B) THE SERVICE MUST BE PERFORMED OUTSIDE THE USUAL COURSE OF BUSINESS  
51 FOR WHICH THE SERVICE IS PERFORMED; AND

52 (C) THE INDIVIDUAL IS CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTAB-  
53 LISHED TRADE, OCCUPATION, PROFESSION, OR BUSINESS THAT IS SIMILAR TO THE  
54 SERVICE AT ISSUE.

55 2. A BUSINESS ENTITY, INCLUDING ANY SOLE PROPRIETOR, PARTNERSHIP,  
56 CORPORATION OR ENTITY THAT MAY BE A CONTRACTOR UNDER THIS SECTION SHALL  
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1 BE CONSIDERED A SEPARATE BUSINESS ENTITY FROM THE CONTRACTOR WHERE ALL  
2 THE FOLLOWING CRITERIA ARE MET:

3 (A) THE BUSINESS ENTITY IS PERFORMING THE SERVICE FREE FROM THE DIREC-  
4 TION OR CONTROL OVER THE MEANS AND MANNER OF PROVIDING THE SERVICE,  
5 SUBJECT ONLY TO THE RIGHT OF THE CONTRACTOR FOR WHOM THE SERVICE IS  
6 PROVIDED TO SPECIFY THE DESIRED RESULT;

7 (B) THE BUSINESS ENTITY IS NOT SUBJECT TO CANCELLATION OR DESTRUCTION  
8 UPON SEVERANCE OF THE RELATIONSHIP WITH THE CONTRACTOR;

9 (C) THE BUSINESS ENTITY HAS A SUBSTANTIAL INVESTMENT OF CAPITAL IN THE  
10 BUSINESS ENTITY BEYOND ORDINARY TOOLS AND EQUIPMENT AND A PERSONAL VEHI-  
11 CLE;

12 (D) THE BUSINESS ENTITY OWNS THE CAPITAL GOODS AND GAINS THE PROFITS  
13 AND BEARS THE LOSSES OF THE BUSINESS ENTITY;

14 (E) THE BUSINESS ENTITY MAKES ITS SERVICES AVAILABLE TO THE GENERAL  
15 PUBLIC OR THE BUSINESS COMMUNITY ON A CONTINUING BASIS;

16 (F) THE BUSINESS ENTITY INCLUDES SERVICES RENDERED ON A FEDERAL INCOME  
17 TAX SCHEDULE AS AN INDEPENDENT BUSINESS OR PROFESSION;

18 (G) THE BUSINESS ENTITY PERFORMS SERVICES FOR THE CONTRACTOR UNDER THE  
19 BUSINESS ENTITY'S NAME;

20 (H) WHEN THE SERVICES BEING PROVIDED REQUIRE A LICENSE OR PERMIT, THE  
21 BUSINESS ENTITY OBTAINS AND PAYS FOR THE LICENSE OR PERMIT IN THE BUSI-  
22 NESS ENTITY'S NAME;

23 (I) THE BUSINESS ENTITY FURNISHES THE TOOLS AND EQUIPMENT NECESSARY TO  
24 PROVIDE THE SERVICE;

25 (J) IF NECESSARY, THE BUSINESS ENTITY HIRES ITS OWN EMPLOYEES WITHOUT  
26 CONTRACTOR APPROVAL, PAYS THE EMPLOYEES WITHOUT REIMBURSEMENT FROM THE  
27 CONTRACTOR AND REPORTS THE EMPLOYEES' INCOME TO THE INTERNAL REVENUE  
28 SERVICE;

29 (K) THE CONTRACTOR DOES NOT REPRESENT THE BUSINESS ENTITY AS AN  
30 EMPLOYEE OF THE CONTRACTOR TO ITS CUSTOMERS; AND

31 (L) THE BUSINESS ENTITY HAS THE RIGHT TO PERFORM SIMILAR SERVICES FOR  
32 OTHERS ON WHATEVER BASIS AND WHENEVER IT CHOOSES.

33 3. THE FAILURE TO WITHHOLD FEDERAL OR STATE INCOME TAXES OR TO PAY  
34 UNEMPLOYMENT COMPENSATION CONTRIBUTIONS OR WORKERS' COMPENSATION PREMI-  
35 UMS WITH RESPECT TO AN INDIVIDUAL'S WAGES SHALL NOT BE CONSIDERED IN  
36 MAKING A DETERMINATION UNDER THIS SECTION, EXCEPT AS SET FORTH IN PARA-  
37 GRAPH (F) OF SUBDIVISION TWO OF THIS SECTION.

38 4. AN INDIVIDUAL'S ACT OF SECURING WORKERS' COMPENSATION INSURANCE  
39 WITH A CARRIER AS A SOLE PROPRIETOR, PARTNERSHIP OR OTHERWISE SHALL NOT  
40 BE BINDING ON ANY DETERMINATION UNDER THIS SECTION.

41 5. WHEN A BUSINESS ENTITY MEETS THE DEFINITION OF A SEPARATE BUSINESS  
42 ENTITY PURSUANT TO SUBDIVISION TWO OF THIS SECTION, THE SEPARATE BUSI-  
43 NESS ENTITY WILL BE CONSIDERED A CONTRACTOR SUBJECT TO ALL THE  
44 PROVISIONS OF THIS ARTICLE IN REGARD TO THE CLASSIFICATION OF INDIVID-

45 UALS PERFORMING SERVICES FOR IT.

46 S 861-D. NOTICE TO PERSONS RECEIVING REMUNERATION FROM CONTRACTORS AND  
47 SUBCONTRACTORS. 1. EVERY CONTRACTOR SHALL POST IN A PROMINENT AND ACCES-  
48 SIBLE PLACE ON THE SITE WHERE THE CONSTRUCTION IS PERFORMED A LEGIBLE  
49 STATEMENT, PROVIDED BY THE COMMISSIONER, THAT DESCRIBES THE RESPONSIBIL-  
50 ITY OF INDEPENDENT CONTRACTORS TO PAY TAXES REQUIRED BY STATE AND FEDER-  
51 AL LAW, THE RIGHTS OF EMPLOYEES TO WORKERS' COMPENSATION, UNEMPLOYMENT  
52 BENEFITS, MINIMUM WAGE, OVERTIME AND OTHER FEDERAL AND STATE WORKPLACE  
53 PROTECTIONS, AND THE PROTECTIONS AGAINST RETALIATION AND THE PENALTIES  
54 IN THIS ARTICLE IF THE CONTRACTOR FAILS TO PROPERLY CLASSIFY AN INDIVID-  
55 UAL AS AN EMPLOYEE. THIS NOTICE SHALL ALSO CONTAIN CONTACT INFORMATION  
56 FOR INDIVIDUALS TO FILE COMPLAINTS OR INQUIRE WITH THE COMMISSIONER  
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1 ABOUT EMPLOYMENT CLASSIFICATION STATUS. THIS INFORMATION SHALL BE  
2 PROVIDED IN ENGLISH, SPANISH OR OTHER LANGUAGES REQUIRED BY THE COMMIS-  
3 SIONER. THE POSTED STATEMENT SHALL BE CONSTRUCTED OF MATERIALS CAPABLE  
4 OF WITHSTANDING ADVERSE WEATHER CONDITIONS.

5 2. WITHIN THIRTY DAYS OF THE EFFECTIVE DATE OF THIS ARTICLE, THE  
6 COMMISSIONER SHALL CREATE THE NOTICE DESCRIBED IN SUBDIVISION ONE OF  
7 THIS SECTION AND POST THE NOTICE ON THE DEPARTMENT'S WEBSITE FOR DOWN-  
8 LOADING BY CONTRACTORS.

9 3. CONTRACTORS WHO VIOLATE THIS SECTION SHALL BE SUBJECT TO A CIVIL  
10 PENALTY OF UP TO ONE THOUSAND FIVE HUNDRED DOLLARS FOR A FIRST  
11 VIOLATION, AND UP TO FIVE THOUSAND DOLLARS FOR A SUBSEQUENT VIOLATION  
12 WITHIN A FIVE YEAR PERIOD.

13 S 861-E. VIOLATIONS AND PENALTIES. 1. ANY CONTRACTOR WHO WILFULLY  
14 FAILS TO PROPERLY CLASSIFY AN INDIVIDUAL AS AN EMPLOYEE AS PROVIDED  
15 UNDER SECTION EIGHT HUNDRED SIXTY-ONE-C OF THIS ARTICLE SHALL BE SUBJECT  
16 TO THE CIVIL AND CRIMINAL PENALTIES PROVIDED UNDER THIS SECTION. THE  
17 CIVIL PENALTIES SET FORTH IN THIS SECTION SHALL BE IMPOSED AS FOLLOWS:  
18 BY THE COMMISSIONER WHERE SUCH PENALTY IS BASED ON A VIOLATION OF THIS  
19 CHAPTER; BY THE CHAIR OF THE WORKERS' COMPENSATION BOARD WHERE SUCH  
20 PENALTY IS BASED ON A VIOLATION OF THE WORKERS' COMPENSATION LAW; AND BY  
21 THE COMMISSIONER OF TAX AND FINANCE WHEN SUCH PENALTY IS BASED ON A  
22 VIOLATION OF THE TAX LAW, PROVIDED THAT NO MORE THAN ONE CIVIL PENALTY  
23 UNDER THIS SECTION MAY BE IMPOSED PER EMPLOYEE PER INCIDENT OF MISCLAS-  
24 SIFICATION.

25 (A) THE WORKERS' COMPENSATION BOARD SHALL PROVIDE A COPY OF ANY ORDER  
26 RELATING TO THE MISCLASSIFICATION OF AN EMPLOYEE, THE INTENTIONAL AND  
27 MATERIAL UNDERPAYMENT OR CONCEALMENT OF PAYROLL, OR THE FAILURE TO  
28 SECURE WORKERS' COMPENSATION IN THE CONSTRUCTION INDUSTRY TO THE COMMIS-  
29 SIONER AND COMMISSIONER OF TAXATION AND FINANCE NO LATER THAN SEVEN DAYS  
30 AFTER THE ISSUANCE OF THE ORDER.

31 (B) NOTWITHSTANDING THE SECRECY PROVISIONS CONTAINED IN ARTICLES  
32 NINE-A AND TWENTY-TWO OF THE TAX LAW, THE DEPARTMENT OF TAXATION AND  
33 FINANCE SHALL PROVIDE A COPY OF ANY ASSESSMENT FOR FAILURE TO PAY BUSI-  
34 NESS, CORPORATE OR PERSONAL INCOME TAX BY AN EMPLOYER IN THE  
35 CONSTRUCTION INDUSTRY ARISING OUT OF THE MISCLASSIFICATION OF AN EMPLOY-  
36 EE TO THE COMMISSIONER AND CHAIR OF THE WORKERS' COMPENSATION BOARD NO  
37 LATER THAN SEVEN DAYS AFTER THE ISSUANCE OF THE ASSESSMENT.

38 (C) UPON THE ISSUANCE OF AN ORDER OR DETERMINATION BY THE COMMISSIONER  
39 FOR A VIOLATION AND PENALTIES UNDER THIS ARTICLE, THE COMMISSIONER SHALL  
40 PROVIDE A COPY OF THE ORDER TO THE CHAIR OF THE WORKERS' COMPENSATION  
41 BOARD AND THE COMMISSIONER OF TAXATION AND FINANCE NO LATER THAN SEVEN  
42 DAYS AFTER THE ISSUANCE OF THE ORDER.

43 2. FOR THE PURPOSES OF THIS SECTION, THE TERM "WILLFULLY VIOLATES"  
44 MEANS A CONTRACTOR KNEW OR SHOULD HAVE KNOWN THAT HIS OR HER CONDUCT WAS  
45 PROHIBITED BY THIS SECTION.

46 3. ANY CONTRACTOR WHO WILLFULLY VIOLATES SECTION EIGHT HUNDRED SIXTY-  
47 ONE-C OF THIS ARTICLE SHALL BE SUBJECT TO A CIVIL PENALTY OF UP TO TWEN-  
48 TY-FIVE HUNDRED DOLLARS FOR THE FIRST VIOLATION PER MISCLASSIFIED  
49 EMPLOYEE AND TO A CIVIL PENALTY OF UP TO FIVE THOUSAND DOLLARS FOR EACH  
50 SUBSEQUENT VIOLATION PER MISCLASSIFIED EMPLOYEE WITHIN A FIVE YEAR PERI-  
51 OD.

52 4. IN ADDITION TO CIVIL PENALTIES, THE CRIMINAL PENALTIES IMPOSED ON A  
53 CONTRACTOR WHO WILLFULLY VIOLATES THE PROVISIONS OF THIS ARTICLE SHALL  
54 BE A MISDEMEANOR AND UPON CONVICTION SHALL BE PUNISHED FOR A FIRST  
55 OFFENSE BY IMPRISONMENT FOR NOT MORE THAN THIRTY DAYS OR A FINE NOT TO  
56 EXCEED TWENTY-FIVE THOUSAND DOLLARS AND FOR A SUBSEQUENT OFFENSE BY  
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1 IMPRISONMENT FOR NOT MORE THAN SIXTY DAYS OR A FINE NOT TO EXCEED FIFTY  
2 THOUSAND DOLLARS.

3 5. IF THE CONTRACTOR IS A CORPORATION, ANY OFFICER OF SUCH CORPORATION  
4 OR SHAREHOLDER WHO OWNS OR CONTROLS AT LEAST TEN PERCENT OF THE  
5 OUTSTANDING STOCK OF SUCH CORPORATION WHO KNOWINGLY PERMITS THE CORPO-  
6 RATION TO WILLFULLY VIOLATE THE PROVISIONS OF THIS ARTICLE SHALL ALSO BE  
7 IN VIOLATION OF THIS ARTICLE AND THE CIVIL AND CRIMINAL PENALTIES HEREIN  
8 SHALL ATTACH TO SUCH OFFICER UPON CONVICTION.

9 6. ANY CONTRACTOR SUBJECT TO CIVIL PENALTIES UNDER THIS ARTICLE SHALL  
10 ALSO BE SUBJECT TO ANY OTHER APPLICABLE PENALTIES OR REMEDIES PROVIDED  
11 BY LAW FOR FAILURE TO PAY ANY OTHER STATUTORY PAYMENT OR COVERAGE OBLI-  
12 GATIONS, INCLUDING BUT NOT LIMITED TO, UNEMPLOYMENT INSURANCE, WORKERS'  
13 COMPENSATION INSURANCE, OR BUSINESS, CORPORATE OR PERSONAL INCOME TAX,  
14 AS FOLLOWS:

15 (A) FOR FAILURE TO PAY UNEMPLOYMENT INSURANCE TAX, THE PENALTIES  
16 IMPOSED BY SECTION FIVE HUNDRED SEVENTY OF THIS CHAPTER.

17 (B) FOR INTENTIONAL AND MATERIAL UNDERSTATEMENT OR CONCEALMENT OF  
18 PAYROLL OR FAILURE TO SECURE WORKERS' COMPENSATION INSURANCE, THE PENAL-  
19 TIES IMPOSED BY PARAGRAPH (D) OF SUBDIVISION ONE OF SECTION FIFTY-TWO OF  
20 THE WORKERS' COMPENSATION LAW, AND FOR FAILURE TO KEEP A TRUE AND ACCU-  
21 RATE RECORD PURSUANT TO SECTION ONE HUNDRED THIRTY-ONE OF THE WORKERS'  
22 COMPENSATION LAW, THE PENALTIES OF SECTION ONE HUNDRED THIRTY-ONE OF THE  
23 WORKERS' COMPENSATION LAW.

24 (C) FOR FAILURE TO PAY BUSINESS, CORPORATE OR PERSONAL INCOME TAX, THE  
25 PENALTIES IMPOSED BY SECTION SIX HUNDRED EIGHTY-FIVE AND ONE THOUSAND  
26 EIGHTY-FIVE OF THE TAX LAW.

27 7. ANY CONTRACTOR OR ANY OFFICER OR SHAREHOLDER WHO OWNS OR CONTROLS  
28 AT LEAST TEN PERCENT OF THE OUTSTANDING STOCK OF SUCH CORPORATION THAT  
29 HAS BEEN CONVICTED OF A MISDEMEANOR SHALL BE SUBJECT TO DEBARMENT AND BE  
30 INELIGIBLE TO SUBMIT ABID ON OR BE AWARDED ANY PUBLIC WORKS CONTRACT  
31 WITH THE STATE, ANY MUNICIPAL CORPORATION, PUBLIC BENEFIT CORPORATION,  
32 PUBLIC AUTHORITY OR PUBLIC BODY FOR A PERIOD OF UP TO ONE YEAR FROM THE  
33 DATE OF SUCH CONVICTION OR FINAL DETERMINATION, OR UP TO FIVE YEARS IN  
34 THE EVENT OF ANY SUBSEQUENT VIOLATION.

35 8. ANY SUBSTANTIALLY OWNED AFFILIATED ENTITY OF A CONTRACTOR, AS  
36 DEFINED BY PARAGRAPH G OF SUBDIVISION FIVE OF SECTION TWO HUNDRED TWENTY  
37 OF THIS CHAPTER, SHALL BE SUBJECT TO THE SAME CIVIL PENALTY PROVIDED  
38 UNDER THIS ARTICLE FOR A VIOLATION OF SUCH PROVISION.

39 9. ANY PENALTIES IMPOSED UNDER THIS SECTION BY THE COMMISSIONER SHALL  
40 BE APPEALED TO THE INDUSTRIAL BOARD OF APPEALS IN ACCORDANCE WITH ARTI-  
41 CLE THREE OF THIS CHAPTER. ANY PENALTIES IMPOSED UNDER THIS SECTION BY  
42 THE WORKERS' COMPENSATION BOARD OR COMMISSIONER OF TAXATION AND FINANCE  
43 SHALL BE APPEALED IN THE SAME MANNER AS THE UNDERLYING VIOLATION.

44 10. NOTHING IN THIS SECTION SHALL LIMIT THE AVAILABILITY OF OTHER  
45 REMEDIES AT LAW OR IN EQUITY FOR A VIOLATION OF THIS ARTICLE.

46 11. ANY FEE OR PENALTY ASSESSED FOR A VIOLATION OF THIS ARTICLE SHALL

47 BE DEPOSITED INTO THE DEPARTMENT'S FEE AND PENALTY ACCOUNT.

48 S 861-F. RETALIATION. 1. IT IS A VIOLATION OF THIS ARTICLE FOR AN  
49 EMPLOYER OR ANY AGENT OF ANY EMPLOYER, TO RETALIATE THROUGH DISCHARGE OR  
50 IN ANY OTHER MANNER AGAINST ANY PERSON IN THE TERMS OF CONDITIONS OF HIS  
51 OR HER EMPLOYMENT FOR EXERCISING ANY RIGHTS GRANTED UNDER THIS ARTICLE  
52 FOR:

53 (A) MAKING, OR THREATENING TO MAKE, A COMPLAINT TO AN EMPLOYER,  
54 CO-WORKER OR TO A PUBLIC BODY THAT RIGHTS GUARANTEED UNDER THIS ARTICLE  
55 HAVE BEEN VIOLATED;  
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1 (B) CAUSING TO BE INSTITUTED ANY PROCEEDING UNDER OR RELATED TO THIS  
2 ARTICLE; OR

3 (C) PROVIDING INFORMATION TO, OR TESTIFYING BEFORE, ANY PUBLIC BODY  
4 CONDUCTING AN INVESTIGATION, HEARING OR INQUIRY INTO ANY SUCH VIOLATION  
5 OF A LAW, RULE OR REGULATION BY SUCH EMPLOYER. NOTHING IN THIS SECTION  
6 SHALL LIMIT THE COMMISSIONER'S AUTHORITY UNDER SECTION TWO HUNDRED  
7 FIFTEEN OF THE LABOR LAW, OR ANY OTHER STATUTE.

8 2. ANY ACT OF RETALIATION UNDER THIS SECTION SHALL SUBJECT AN EMPLOYER  
9 TO THE CIVIL PENALTIES UNDER SECTION EIGHT HUNDRED SIXTY-ONE-E OF THIS  
10 ARTICLE, OR TO A PRIVATE CAUSE OF ACTION, OR BOTH.

11 S 2. Paragraph (b) of subdivision 1 of section 511 of the labor law is  
12 amended by adding a new subparagraph 1-b to read as follows:

13 (1-B) AS AN EMPLOYEE IN THE CONSTRUCTION INDUSTRY UNLESS THE PRESUMP-  
14 TION OF EMPLOYMENT CAN BE OVERCOME, AS PROVIDED UNDER SECTION EIGHT  
15 HUNDRED SIXTY-ONE-C OF THIS CHAPTER; OR

16 S 3. The opening paragraph of subdivision 4 of section 2 of the work-  
17 ers' compensation law, as amended by chapter 205 of the laws of 1993, is  
18 amended to read as follows:

19 "Employee" means a person engaged in one of the occupations enumerated  
20 in section three OF THIS ARTICLE or who is in the service of an employer  
21 whose principal business is that of carrying on or conducting a hazard-  
22 ous employment upon the premises or at the plant, or in the course of  
23 his OR HER employment away from the plant of his OR HER employer;  
24 "EMPLOYEE" SHALL ALSO MEAN FOR THE PURPOSES OF THIS CHAPTER ANY INDIVID-  
25 UAL PERFORMING SERVICES IN CONSTRUCTION FOR A CONTRACTOR WHO DOES NOT  
26 OVERCOME THE PRESUMPTION OF EMPLOYMENT AS PROVIDED UNDER SECTION EIGHT  
27 HUNDRED SIXTY-ONE-C OF THE LABOR LAW; "employee" shall also mean for the  
28 purposes of this chapter civil defense volunteers who are personnel of  
29 volunteer agencies sponsored or authorized by a local office under regu-  
30 lations of the civil defense commission, to the extent of the provisions  
31 of groups seventeen and nineteen; "employee" shall at the election of a  
32 municipal corporation made pursuant to local law duly enacted also mean  
33 a member of an auxiliary police organization authorized by local law;  
34 and for the purposes of this chapter only a newspaper carrier under the  
35 age of eighteen years as defined in section thirty-two hundred twenty-  
36 eight of the education law, and shall not include domestic servants  
37 except as provided in section three of this chapter, and except where  
38 the employer has elected to bring such employees under the law by secur-  
39 ing compensation in accordance with the terms of section fifty of this  
40 chapter. The term "employee" shall not include persons who are members  
41 of a supervised amateur athletic activity operated on a non-profit  
42 basis, provided that said members are not also otherwise engaged or  
43 employed by any person, firm or corporation participating in said  
44 athletic activity, nor shall it include the spouse or minor child of an  
45 employer who is a farmer unless the services of such spouse or minor  
46 child shall be engaged by said employer under an express contract of  
47 hire nor shall it include an executive officer of a corporation who at  
48 all times during the period involved owns all of the issued and

49 outstanding stock of the corporation and holds all of the offices pursu-  
50 ant to paragraph (e) of section seven hundred fifteen of the business  
51 corporation law or two executive officers of a corporation who at all  
52 times during the period involved between them own all of the issued and  
53 outstanding stock of such corporation and hold all such offices except  
54 as provided in subdivision six of section fifty-four of this chapter  
55 provided, however, that where there are two executive officers of a  
56 corporation each officer must own at least one share of stock, nor shall  
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1 it include a self-employed person or a partner of a partnership as  
2 defined in section ten of the partnership law who is not covered under a  
3 compensation insurance contract or a certificate of self-insurance as  
4 provided in subdivision eight of section fifty-four of this chapter, nor  
5 shall it include farm laborers except as provided in group fourteen-b of  
6 section three of this chapter. If a farm labor contractor recruits or  
7 supplies farm laborers for work on a farm, such farm laborers shall for  
8 the purposes of this chapter be deemed to be employees of the owner or  
9 lessee of such farm. The term "employee" shall not include baby sitters  
10 as defined in subdivision three of section one hundred thirty-one and  
11 subdivision three of section one hundred thirty-two of the labor law or  
12 minors fourteen years of age or over engaged in casual employment  
13 consisting of yard work and household chores in and about a one family  
14 owner-occupied residence or the premises of a non-profit, non-commercial  
15 organization, not involving the use of power-driven machinery. The term  
16 "employee" shall not include persons engaged by the owner in casual  
17 employment consisting of yard work, household chores and making repairs  
18 to or painting in and about a one-family owner-occupied residence. The  
19 term "employee" shall not include the services of a licensed real estate  
20 broker or sales associate if it be proven that (a) substantially all of  
21 the remuneration (whether or not paid in cash) for the services  
22 performed by such broker or sales associate is directly related to sales  
23 or other output (including the performance of services) rather than to  
24 the number of hours worked; (b) the services performed by the broker or  
25 sales associate are performed pursuant to a written contract executed  
26 between such broker or sales associate and the person for whom the  
27 services are performed within the past twelve to fifteen months; and (c)  
28 the written contract provided for in paragraph (b) [herein] OF THIS  
29 SUBDIVISION was not executed under duress and contains the following  
30 provisions:

31 S 4. Notwithstanding any other provision of the law to the contrary,  
32 the provisions of section 861-c of the labor law, as added by section  
33 one of this act, shall apply to and be utilized for all determinations  
34 of a construction industry individual's employment status under the  
35 labor law and the workers' compensation law, but not the tax law.

36 S 5. This act shall take effect on the sixtieth day after it shall  
37 have become a law.