

New Virginia Law Regarding Worker Classification

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“Mechanics of Construction Law” is a publication by McGlinchey’s team of attorneys from across the United States who represent architects, engineers, contractors, developers, owners, insurers, and lenders in all aspects of Construction Law.

States are focusing more attention on the worker classification issue (employee vs. independent contractor). For example, New York has the Construction Industry Fair Play Act, which treats construction workers as employees unless:

- They are free from direction and control in performing their job; and
- They perform work that is not part of the usual work done by the business that hired them; and
- They have an independent established business.

The Virginia legislature recently passed bills ([H.B. 1407](#) and [S.B. 662](#)) that would give the Department of Taxation the authority to investigate and impose penalties on companies that improperly classify their workers as independent contractors. In addition to a fine for misclassifying workers, a company could be barred from contracts with public bodies and certain “covered” institutions in Virginia.

H.B. 1407 would add a new Chapter 19 to Title 58. New § 58.1-1900 would provide the following:

For purposes of this title and Title 40.1 [Labor and Employment], Title 60.2 [Unemployment Compensation] and Title 65.2 [Workers’ Compensation], if an individual performs services for an employer for remuneration, that individual shall be considered an employee of the party that pays the remuneration unless such individual or his employer demonstrates that such individual is an independent contractor. The Department [of Taxation] shall determine whether an individual is an independent contractor by applying Internal Revenue Service guidelines.

S.B. 662 would add in Article 2 of Chapter 3 of Title 40.1 a new § 40.1-33.1 captioned “Retaliatory actions prohibited; civil penalty.” This provision protects employees against retaliation for disclosing worker misclassification. In addition to being required to reinstate any employee who is terminated for disclosing worker misclassifications and reimbursing him or her for lost wages, the company will be subject to a civil penalty not to exceed the amount of the worker’s wages that are lost due to the retaliation.

This action by Virginia does not specifically target the construction industry, as does the New York law, but is consistent with a growing trend at the state level to address the worker classification issue. Reclassifying employees as independent contractors can raise revenue and provide workers with greater protection and benefits. The Federal government, which has focused on this issue for decades, is also increasing its enforcement efforts.

McGlinchey Member Douglas Charnas wrote a Tax Prep Guide that contains useful information on the Internal Revenue Service's approach to worker classification. If you would like a copy of the Guide, [please email Douglas](#).

Douglas began working on the worker classification issue in 1978 as an attorney for the Department of Treasury when he tracked through Congress Section 530 of the Revenue Act of 1978, which provides certain safe harbors to businesses. While in private practice, he worked with the Internal Revenue Service to develop common-sense solutions to this difficult issue, and has represented a number of companies in IRS examinations involving worker classification.

We would be happy to address any questions you have or issues you may be facing about the worker classification issue.

Related people

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