



ILLINOIS DEPARTMENT OF LABOR

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The Department's proposed rules for the "Employee Classification Act" [820 ILCS 185] were published in the Second (2nd) Issue of the Illinois Register on Friday, January 11, 2008. Since then, the Department has reviewed and responded to the many public comments received.

The following is the Department's proposed rules including the Department's proposed changes in response to the comments received. The proposed rules will be heard before the Joint Committee on Administrative Rules at the July meeting.

If you have any questions regarding the proposed rules please call Carmela Gonzalez at 312-793-1808.

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TITLE 56: LABOR AND EMPLOYMENT
CHAPTER I: DEPARTMENT OF LABOR
SUBCHAPTER b: REGULATION OF WORKING CONDITIONS

PART 240
EMPLOYEE CLASSIFICATION

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AUTHORITY: Implementing and authorized by the Employee Classification Act [820 ILCS 185].

SOURCE: Emergency rule adopted at 32 Ill. Reg. 574, effective December 27, 2007, for a maximum of 150 days; amended at 32 Ill. Reg. _____, effective _____.

SUBPART A: GENERAL PROVISIONS

Section 240.100 Purpose and Scope

- a) The Act addresses the practice in the construction industry of some contractors misclassifying individuals as independent contractors in order to avoid payroll taxes, unemployment insurance contributions, workers' compensation premiums and minimum wage and overtime payments. This practice of misclassification puts contractors that comply with tax and employment laws at a competitive disadvantage.
- b) For purposes of ensuring that contractors comply with tax and employment laws, the Department of Labor, the Department of Employment Security, the Department of Revenue and the Illinois Workers' Compensation Commission shall cooperate by sharing information concerning any suspected misclassification of employees as independent contractors.

Section 240.110 Definitions

"Act" means the Employee Classification Act [820 ILCS 185].

"Construction" means any constructing, altering, reconstructing, repairing, rehabilitating, refinishing, refurbishing, remodeling, remediating, renovating, custom fabricating, maintenance, landscaping, improving, wrecking, painting, decorating, demolishing, and 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, whether or not the performance of the work herein described involves the addition to, or fabrication into, any structure, project, development, real property or improvement herein described of any material or article of merchandise.

Construction shall also include moving construction related materials on the job site to or from the job site.

"Contractor" means any sole proprietor, partnership, firm, corporation, limited liability company, association or other legal entity permitted by law to do business within the State of Illinois who engages in construction as defined in the Act. Contractor includes a general contractor and a subcontractor.

"Department" means the Department of Labor.

"Director" means the Director of the Department of Labor or an authorized representative.

"Employer" means any contractor that employs individuals deemed employees under Section 10 of the Act; however, "employer" does not include:

the State of Illinois or its officers, agencies, or political subdivisions; or

the federal government.

"Entity" means any contractor for which an individual is performing services and is not classified as an employee under Section 10 of the Act; however, "entity" does not include:

the State of Illinois or its officers, agencies, or political subdivisions; or

the federal government.

"Individual performing services" does not include a bona fide corporation nor a limited liability company (LLC). In determining whether a corporation is bona fide for purposes of this Act, the Department ~~may~~ 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; ~~or~~ 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.

“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.”

"Interested party" means a person with an interest in compliance with the Act.

"Performing services" means the performance of any constructing, altering, reconstructing, repairing, rehabilitating, refinishing, refurbishing, remodeling, remediating, renovating, custom fabricating, maintenance, landscaping, improving, wrecking, painting, decorating, demolishing, and 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, whether or not the performance of the work herein described involves the addition to, or fabrication into, any structure, project, development, real property or improvement herein described of

any material or article of merchandise. Construction shall also include moving construction related materials on the job site to or from the job site. [820 ILCS 185/5]

"Permitted by law to do business within the State of Illinois" means located, operating, ~~or~~ transacting business, or performing services within the State of Illinois.

~~"Person with an interest in compliance with the Act" means a contractor, as defined in the Act; an individual performing services for a contractor; or a third party representing a contractor or an individual performing services for a contractor, but does not include the Department of Labor.~~

Section 240.120 Application of the Act

- a) Any individual performing services for a contractor on or after January 1, 2008 is covered by the Act.
- b) ~~Any construction project that began prior to the effective date of the Act~~ but Construction services performed on or ~~continues~~ after January 1, 2008 is ~~are~~ covered by the Act. The misclassification of an employee as an independent contractor prior to January 1, 2008 shall not serve as the basis for a violation under the Act.

Section 240.130 Jurisdiction

The Act covers public and private construction performed in the State of Illinois.

Section 240.140 Waivers

There shall be no waiver of any provision of the Act.

SUBPART B: COMPLAINTS

Section 240.200 Persons Who May File a Complaint

Any ~~individual or~~ interested party, ~~including~~ or the Department, may file a complaint alleging a violation of the Act.

Section 240.210 Contents and Filing of a Complaint

- a) A complaint shall be filed on a form to be supplied by the Department. A complaint should be in such detail as to substantially apprise the Department of the dates, locations and facts with respect to the alleged violation of the Act. Each complaint shall contain the following information:

- 1) the full name and address of the complainant;
 - 2) the full name and address of the contractor;
 - 3) a statement or reflection of the complainant's basis of knowledge of the essential facts constituting the alleged violation, including the dates and locations of the alleged violation and the nature of the contractor's business;
 - 4) the complainant's signature, including date of signing; and
 - 5) a statement as to any other action, civil or criminal, instituted by the complainant or that the complainant has knowledge of, in any other forum based on the same violation as alleged in the complaint, together with a statement as to the status or disposition of the other action.
- b) Complaints must be filed within 180 days from the date of the alleged violation.
- c) Any complaint that fails to meet the requirements set forth in subsection (a) of this Section may be accepted by the Director if it otherwise contains the information determined by the Director to be necessary for a proper investigation and review of the alleged violation contained in the complaint.
- d) All complaints ~~shall~~ **should** be delivered by U.S. mail or personal delivery ~~to the~~ **filed with the** Department's Springfield office and will be considered filed upon receipt. Complaints shall not be accepted by facsimile or other electronic transmission.

Section 240.220 Review of Complaints and Dismissals

- a) Complaints shall be reviewed by the Department to determine whether there is cause for investigation.
- b) If the complaint fails to conform to the requirements set forth in Section 240.210, the complaint may be dismissed.
- c) A complaint may also be dismissed for lack of jurisdiction; **(examples include, but are not limited to: the construction project is located outside the state of Illinois, the complaint does not involve construction services, for example, an individual performing services in a nail salon);** failure to cooperate with the investigation; **(examples include, but are not limited to: failure to respond to reasonable requests from the Department, for**

example, not returning phone calls, not answering questions posed during the investigation); inability to locate a party; failure to complete a complaint; lack of evidence that a violation under the Act occurred; or repeat complaints filed by the same interested party against the same contractor for the same investigation.

- d) The Department shall serve a written notice of dismissal of all or part of a complaint. The dismissal notice shall state the grounds for dismissal. The dismissal notice shall also advise the parties of the right to bring a private action pursuant to Section 60 of the Act.
- e) If at any time the Department becomes aware that there is a complaint pending in federal or State court containing some or all of the issues before the Department, it may suspend or close its investigation of those issues of the complaint that are being litigated and continue to process the remaining issues. The Department shall notify all parties in writing if its investigation of a complaint has been suspended or closed.

Section 240.230 Incomplete Complaint

If the Department receives a written complaint that complies substantially with Section 240.210 but is lacking an element that still must be provided, the Department may accept the complaint as an incomplete complaint. The Department shall notify the complainant in writing of the element that must be supplied. If the complainant fails or refuses to perfect the complaint within 30 calendar days, the complaint may be dismissed pursuant to Section 240.220.

SUBPART C: INVESTIGATION PROCEDURES

Section 240.300 Investigation

The Department shall conduct an investigation to ascertain the facts relating to the violation alleged in the complaint and determine whether a violation under the Act has occurred. The investigation may be made by written or oral inquiry, field visit, conference or any method or combination of methods deemed suitable ~~in~~ at the discretion of the Department.

- a) During the investigation, if a contractor refuses to cooperate, the Department may make a finding that the Act has been violated- based upon the evidence available to the Department. ~~A contractor's refusal to cooperate with the Department's investigation shall constitute evidence that the contractor has violated the Act.~~
- b) Complainants must provide the Department a notice of address change, telephone change or any prolonged absence from the current address so that the Department can fully investigate the complaint. All complainants

must cooperate with the Department, provide necessary information and be available for interviews and conferences upon reasonable notice or request by the Department. If a complainant cannot be located or does not respond to reasonable requests by the Department, the Department ~~may~~ shall dismiss the individual from the complaint pursuant to Section 240.220.

- c) The Department may investigate alleged violations for up to ~~five~~ three years preceding the date the complaint was filed; however, in no instance shall the Department investigate complaints for alleged violations that occurred prior to January 1, 2008.
- d) Before making a final determination of a violation, the Department shall notify the contractors of the substance of the Department's investigation and afford the contractors an opportunity to present any written information, within ~~45~~ 30 calendar days, for the Department to consider in reaching its determination.

Section 240.310 Fact-Finding Conference

As part of its investigation, the Department may convene a fact-finding conference in person or by telephone for the purpose of obtaining additional information or evidence, identifying the issues in dispute, ascertaining the positions of the parties and exploring the possibility of settlement. The fact-finding conferences will be limited to those issues the Department believes to be relevant.

- a) Notice of the conference shall be given to all parties at least ~~40~~ 15 calendar days prior to the conference and shall identify the individuals requested to attend on behalf of each party.
- b) A party may be accompanied at a fact-finding conference by the party's attorney or other representative and by a translator if necessary.
- c) A Department investigator shall conduct the conference and control the proceedings. No tape recordings, stenographic report or other verbatim record of the conference shall be made. If any person fails to cooperate at the conference and becomes so disruptive or abusive that a full and fair conference cannot be conducted, the Department investigator shall exclude the person from the conference.
- d) A party who appears at the conference exclusively through an attorney or other representative unfamiliar with the events at issue shall be deemed to have ~~failed~~ refused to attend, unless, with respect to a contractor, the contractor establishes that it does not employ or control any person with knowledge of the events at issue. A complainant who ~~fails~~ refuses to attend a fact-finding conference ~~may~~ shall be dismissed from the complaint pursuant to Section 240.220. If a contractor or complainant refuses to attend a fact finding conference, the

Department shall make a determination based upon the evidence provided to the Department. ~~A contractor's failure to attend a fact-finding conference shall constitute evidence that the contractor has violated the Act.~~

Section 240.320 Independent Contractor Test

a) An individual performing services for a contractor is deemed to be an employee unless the individual meets all three conditions in Section 10(b)(1), (2) and (3) of the Act or the ~~individual is a sole proprietor or partnership~~ is deemed legitimate by meeting ~~and meets~~ all 12 conditions in Section 10(c) of the Act.

b) ~~"Control" means the existence of general control or right to general control, even though the details of the work are left to an individual's judgment.~~

"In determining whether direction or control exists, the Department will consider the following factors. For purposes of this Section, an "individual" means an individual performing services for a contractor. No one factor is dispositive of the issue of whether an individual is an employee or an independent contractor. The Department will review the totality of circumstances in making a decision on direction and control.

- 1) Is the individual eligible for a pension, health insurance, bonuses, paid vacation, or sick pay?
- 2) Does the contractor carry Workers' Compensation insurance and pay Unemployment Insurance taxes on the individual?
- 3) Does the contractor deduct Social Security taxes from the individual's compensation and report the worker's income to the Internal Revenue Service (IRS)?
- 4) Does the contractor furnish the individual with transportation, samples, business cards, or an expense account?
- 5) Does the contractor require the individual to turn down work from other contractors or assign or limit the territory in which the individual performs services?
- 6) Does the contractor set the price and credit terms for the product or the services being performed by the individual?
- 7) Does the contractor require attendance at meetings or provide training?

- 8) Does the contractor have the right to set rules and regulations?
- 9) Does the contractor require the individual to perform services a specific number of hours per day or per week?
- 10) Does the contractor issue assignments, schedule work or set quotas with time requirements?
- 11) Does the contractor require the individual to follow a routine, order or sequence set by the contractor in performing the services?
- 12) Does the contractor engage the individual with the expectation that the relationship will continue indefinitely, rather than for a specific project or period of time?"
- c) "Usual course of services" means that the services rendered by the individual are necessary to the contractor's business and not simply incidental to the business. The fact that the services are customarily or routinely provided by an individual is not dispositive of the issue of whether the services are actually necessary to the contractor's business. In addition, if a task is performed by both a contractor's employees as well as its independent contractors, the task is considered to be in the usual course of the contractor's services.
- d) "An independently established trade, occupation, profession or business" means the individual performing the services has a proprietary interest in such business, to the extent that the individual operates the business without hindrance from any other person and, as the enterprise's owner, may sell or otherwise transfer the business.
- e) An individual may be an employee without being entirely dependent upon the relationship with a specified contractor for the individual's livelihood. An individual engaged in other occupations may be an employee of a specified contractor even though the individual only worked intermittently or part time.
- f) In determining whether an individual performing services for a contractor is an employee of the contractor, the Department shall consider the actual, rather than the alleged, relationship between the two. Designations and terminology used by the parties, as well as the individual's status for tax purposes, are not controlling.

SUBPART D: RECORD KEEPING AND NOTICE REQUIREMENTS

Section 240.400 Record Keeping

a) ~~Contractors shall maintain records for all individuals performing services for the contractor, regardless of whether those individuals are classified as employees, independent contractors, sole proprietors or partnerships, for a period of five years.~~ Every contractor, including subcontractors, shall maintain records for all individuals performing services for that contractor or subcontractor, regardless of how those individuals are classified. These records shall be maintained for a period of three years unless the records relate to an ongoing investigation or enforcement action under the Act, in which case the records must be maintained until their destruction is authorized by the Department or by court order.

- b) Records to be maintained by the contractor shall include all documents related to, or tending to establish the nature of, the relationship between the contractor and individuals performing services. Records that must be maintained for each individual performing services for the contractor include, but are not limited to:
- 1) their names, addresses, phone numbers, Social Security numbers, Individual Tax Identification Numbers and Federal Employer Identification Numbers;
 - 2) the type of work performed and the total number of days and hours worked;
 - 3) the method, frequency and basis on which wages were paid or payments were made;
 - 4) all invoices, billing statements or other payment records, including the dates of payments, and any miscellaneous income paid or deductions made;
 - 5) copies of all contracts, agreements, applications and policy or employment manuals; and
 - 6) any federal and State tax documents. ~~or other information the Department deems relevant or necessary.~~

Section 240.410 Notices

- a) *An entity for whom one or more individuals perform services who are not classified as employees under Section 10 of the Act shall post and keep posted, in a conspicuous place on each job site where those individuals perform services and in each of its offices, a notice in English, Spanish and Polish, prepared by the Department, summarizing the requirements of the Act. [820 ILCS 185/15(b)]*

- b) Where it is not practicable to post a notice on the job site, notices shall be provided to all individuals performing services who are not classified as employees.

SUBPART E: FINAL DETERMINATIONS

Section 240.500 Decision and Notice Following Investigation

- a) If, at the conclusion of an investigation, the Department determines that no violation of the Act or this Part has occurred, the complaint shall be dismissed.
- b) If, at the conclusion of the investigation, the Department determines that a violation of the Act or this Part has occurred, the Department may seek remedies as set forth in Section 240.510.
- c) Whenever a decision is made under this Section, the Department shall provide a written notice to all parties. The notice shall include a statement of the right to bring a civil action as provided for in Section 60 of the Act.
- d) The Department will seek voluntary compliance by the contractor for any violations of the Act. If the contractor fails to pay the penalties or comply with the remedies specified in the notice within 30 calendar days, the Department may within 180 days refer the matter to the Attorney General for enforcement.
- e) Either party may seek review of the Department's final determination by filing a request with the Director within 15 days of the issuance of the final determination."

Section 240.510 Remedies Upon Finding of a Violation

When the Department concludes, based upon its investigation, that a violation of the Act or this Part has occurred, the Department may:

- a) Seek a voluntary settlement agreement that eliminates the unlawful practice and provides appropriate relief;
- b) Recommend the commencement of a civil action;
- c) Issue a cease and desist order;
- d) Assess civil penalties as set forth in Section 40 of the Act;
- e) Collect the amount of any wages, salary, employment benefits or compensation denied or lost to the individual;

- f) Place the contractor on the debarment list pursuant to Section 42 of the Act; and/or
- g) Take any other reasonable action to eliminate the unlawful practice and/or remedy the effect of the violation.

Section 240.520 Civil Penalties

- a) A contractor that violates any of the provisions of the Act or this Part shall be subject to a civil penalty not to exceed \$1,500 for each violation found in the first audit by the Department. Following a first audit, a contractor shall be subject to a civil penalty not to exceed \$2,500 for each repeat violation found by the Department within a five-year period.
- b) Each violation of the Act, for each person and for each day the violation continues, shall constitute a separate and distinct violation.

Section 240.530 Debarments

For any second or subsequent violations determined by the Department within five years after a previous violation, the Department shall add the contractor to a debarment list that will be posted on its official website. The Department shall give notice to the contractor of its placement on the list. No State contract shall be awarded to any contractor placed on the debarment list until four years have elapsed from the date of the last violation.

Section 240.540 ~~Willful Violations~~ Criminal Penalties

- a) Any contractor or individual who willfully violates the Act or this Part, or obstructs the Director of Labor or his or her representatives in the enforcement of the Act, shall be subject to penalties up to double the statutory amount, punitive damages, and/or criminal penalties as set forth in Section 45 of the Act.

~~Section 240.550 Waivers~~

- b) Anyone attempting to induce an individual to waive any provision of the Act shall be guilty of a Class C misdemeanor.

Section ~~240.560~~ 240.550 Retaliation

A contractor shall not retaliate against any person for exercising his/her rights under the Act. Any such retaliation shall subject the contractor to civil penalties, a private cause of action, or both, as set forth in Section 55 of the Act.

Section ~~240.570~~ 240.560 Referral to Other Agencies

If the Department of Labor determines that a contractor has misclassified individuals as independent contractors in violation of the Act, the Department shall notify the Department of Employment Security, the Department of Revenue, the Office of the State Comptroller, and the Illinois Workers' Compensation Commission as set forth in Section 75 of the Act.