BULLETIN

January 11, 2011

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R.C. 2260

To: The Members of the Board

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.

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.

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).


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.

S05847 Text:

STATE OF NEW YORK

5847--F

Cal. No. 782

2009-2010 Regular Sessions

IN SENATE

June 11, 2009

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 ASSEMM-
BLY, DO ENACT AS FOLLOWS:

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

ARTICLE 25-B
THE NEW YORK STATE CONSTRUCTION INDUSTRY FAIR PLAY ACT

SECTION 861. SHORT TITLE.
861-A. LEGISLATIVE FINDINGS AND INTENT.
861-B. DEFINITIONS.
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.

S. 5847--F

861-D. NOTICE TO PERSONS RECEIVING REMUNERATION FROM CONTRACTORS
AND SUBCONTRACTORS.
861-E. VIOLATIONS AND PENALTIES.
861-F. RETALIATION.

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

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

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

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

S 861-B. DEFINITIONS. AS USED IN THIS ARTICLE:
1. "CONSTRUCTION" MEANS CONSTRUCTING, RECONSTRUCTING, ALTERING, MAINTAINING, MOVING, REHABILITATING, REPAIRING, RENOVATING OR DEMOLITION OF ANY BUILDING, STRUCTURE, OR IMPROVEMENT, OR RELATING TO THE EXCAVATION OF OR OTHER DEVELOPMENT OR IMPROVEMENT TO LAND.
2. "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 WHO ENGAGES IN CONSTRUCTION AS DEFINED IN THIS ARTICLE.
3. "CONTRACTOR" INCLUDES A GENERAL CONTRACTOR AND A SUBCONTRACTOR.
4. "DEPARTMENT" MEANS THE DEPARTMENT OF LABOR.
5. "COMMISSIONER" MEANS THE COMMISSIONER OF LABOR.
6. "EMPLOYER" MEANS ANY CONTRACTOR THAT EMPLOYS INDIVIDUALS DEEMED EMPLOYEES UNDER THIS ARTICLE.

S 861-C. PRESUMPTION OF EMPLOYMENT IN THE CONSTRUCTION INDUSTRY. 1.
ANY PERSON PERFORMING SERVICES FOR A CONTRACTOR SHALL BE CLASSIFIED AS
AN EMPLOYEE UNLESS THE PERSON IS A SEPARATE BUSINESS ENTITY UNDER SUBDI-
VISION TWO OF THIS SECTION OR ALL OF THE FOLLOWING CRITERIA ARE MET, IN
WHICH CASE THE PERSON SHALL BE AN INDEPENDENT CONTRACTOR:
(A) THE INDIVIDUAL IS FREE FROM CONTROL AND DIRECTION IN PERFORMING
THE JOB, BOTH UNDER HIS OR HER CONTRACT AND IN FACT;
(B) THE SERVICE MUST BE PERFORMED OUTSIDE THE USUAL COURSE OF BUSINESS
FOR WHICH THE SERVICE IS PERFORMED; AND
(C) THE INDIVIDUAL IS CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTAB-
LISHED TRADE, OCCUPATION, PROFESSION, OR BUSINESS THAT IS SIMILAR TO THE
SERVICE AT ISSUE.

2. A BUSINESS ENTITY, INCLUDING ANY SOLE PROPRIETOR, PARTNERSHIP,
CORPORATION OR ENTITY THAT MAY BE A CONTRACTOR UNDER THIS SECTION SHALL
BE CONSIDERED A SEPARATE BUSINESS ENTITY FROM THE CONTRACTOR WHERE ALL
THE FOLLOWING CRITERIA ARE MET:
(A) THE BUSINESS ENTITY IS PERFORMING THE SERVICE FREE FROM THE DIREC-
TION OR CONTROL OVER THE MEANS AND MANNER OF PROVIDING THE SERVICE,
SUBJECT ONLY TO THE RIGHT OF THE CONTRACTOR FOR WHOM THE SERVICE IS
PROVIDED TO SPECIFY THE DESIRED RESULT;
(B) THE BUSINESS ENTITY IS NOT SUBJECT TO CANCELLATION OR DESTRUCTION
UPON SEVERANCE OF THE RELATIONSHIP WITH THE CONTRACTOR;
(C) THE BUSINESS ENTITY HAS A SUBSTANTIAL INVESTMENT OF CAPITAL IN THE
BUSINESS ENTITY BEYOND ORDINARY TOOLS AND EQUIPMENT AND A PERSONAL VEHI-
CLE;
(D) THE BUSINESS ENTITY OWNS THE CAPITAL GOODS AND GAINS THE PROFITS
AND BARES THE LOSSES OF THE BUSINESS ENTITY;
(E) THE BUSINESS ENTITY MAKES ITS SERVICES AVAILABLE TO THE GENERAL
PUBLIC OR THE BUSINESS COMMUNITY ON A CONTINUING BASIS;
(F) THE BUSINESS ENTITY INCLUDES SERVICES RENDERED ON A FEDERAL INCOME
TAX SCHEDULE AS AN INDEPENDENT BUSINESS OR PROFESSION;
(G) THE BUSINESS ENTITY PERFORMS SERVICES FOR THE CONTRACTOR UNDER THE
BUSINESS ENTITY’S NAME;
(H) WHEN THE SERVICES BEING PROVIDED REQUIRE A LICENSE OR PERMIT, THE
BUSINESS ENTITY OBTAINS AND PAYS FOR THE LICENSE OR PERMIT IN THE BUSI-
NESS ENTITY’S NAME;
(I) THE BUSINESS ENTITY FURNISHES THE TOOLS AND EQUIPMENT NECESSARY TO
PROVIDE THE SERVICE;
(J) IF NECESSARY, THE BUSINESS ENTITY HIRES ITS OWN EMPLOYEES WITHOUT
CONTRACTOR APPROVAL, PAYS THE EMPLOYEES WITHOUT REIMBURSEMENT FROM THE
CONTRACTOR AND REPORTS THE EMPLOYEES' INCOME TO THE INTERNAL REVENUE
SERVICE;
(K) THE CONTRACTOR DOES NOT REPRESENT THE BUSINESS ENTITY AS AN
EMPLOYEE OF THE CONTRACTOR TO ITS CUSTOMERS; AND
(L) THE BUSINESS ENTITY HAS THE RIGHT TO PERFORM SIMILAR SERVICES FOR
OTHERS ON WHATEVER BASIS AND WHENEVER IT CHOOSES.

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

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

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

S 861-D. NOTICE TO PERSONS RECEIVING REMUNERATION FROM CONTRACTORS AND SUBCONTRACTORS. 1. EVERY CONTRACTOR SHALL POST IN A PROMINENT AND ACCESSIBLE PLACE ON THE SITE WHERE THE CONSTRUCTION IS PERFORMED A LEGIBLE STATEMENT, PROVIDED BY THE COMMISSIONER, THAT DESCRIBES THE RESPONSIBILITY OF INDEPENDENT CONTRACTORS TO PAY TAXES REQUIRED BY STATE AND FEDERAL LAW, THE RIGHTS OF EMPLOYEES TO WORKERS' COMPENSATION, UNEMPLOYMENT BENEFITS, MINIMUM WAGE, OVERTIME AND OTHER FEDERAL AND STATE WORKPLACE PROTECTIONS, AND THE PROTECTIONS AGAINST RETALIATION AND THE PENALTIES IN THIS ARTICLE IF THE CONTRACTOR FAILS TO PROPERLY CLASSIFY AN INDIVIDUAL AS AN EMPLOYEE. THIS NOTICE SHALL ALSO CONTAIN CONTACT INFORMATION FOR INDIVIDUALS TO FILE COMPLAINTS OR INQUIRE WITH THE COMMISSIONER.

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

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

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

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

2. FOR THE PURPOSES OF THIS SECTION, THE TERM "WILLFULLY VIOLATES" MEANS A CONTRACTOR KNEW OR SHOULD HAVE KNOWN THAT HIS OR HER CONDUCT WAS PROHIBITED BY THIS SECTION.
3. Any contractor who willfully violates section eight hundred sixty-one-c of this article shall be subject to a civil penalty of up to twenty-five hundred dollars for the first violation per misclassified employee and to a civil penalty of up to five thousand dollars for each subsequent violation per misclassified employee within a five year period.

4. In addition to civil penalties, the criminal penalties imposed on a contractor who willfully violates the provisions of this article shall be a misdemeanor and upon conviction shall be punished for a first offense by imprisonment for not more than thirty days or a fine not to exceed twenty-five thousand dollars and for a subsequent offense by imprisonment for not more than sixty days or a fine not to exceed fifty thousand dollars.

5. If the contractor is a corporation, any officer of such corporation or shareholder who owns or controls at least ten percent of the outstanding stock of such corporation who knowingly permits the corporation to willfully violate the provisions of this article shall also be in violation of this article and the civil and criminal penalties herein shall attach to such officer upon conviction.

6. Any contractor subject to civil penalties under this article shall also be subject to any other applicable penalties or remedies provided by law for failure to pay any other statutory payment or coverage obligations, including but not limited to, unemployment insurance, workers' compensation insurance, or business, corporate or personal income tax, as follows:

(A) For failure to pay unemployment insurance tax, the penalties imposed by section five hundred seventy of this chapter.

(B) For intentional and material understatement or concealment of payroll or failure to secure workers' compensation insurance, the penalties imposed by paragraph (d) of subdivision one of section fifty-two of the workers' compensation law, and for failure to keep a true and accurate record pursuant to section one hundred thirty-one of the workers' compensation law, the penalties of section one hundred thirty-one of the workers' compensation law.

(C) For failure to pay business, corporate or personal income tax, the penalties imposed by section six hundred eighty-five and one thousand eighty-five of the tax law.

7. Any contractor or any officer or shareholder who owns or controls at least ten percent of the outstanding stock of such corporation that has been convicted of a misdemeanor shall be subject to debarment and be ineligible to submit a bid on or be awarded any public works contract with the state, any municipal corporation, public benefit corporation, public authority or public body for a period of up to one year from the date of such conviction or final determination, or up to five years in the event of any subsequent violation.

8. Any substantially owned affiliated entity of a contractor, as defined by paragraph g of subdivision five of section two hundred twenty of this chapter, shall be subject to the same civil penalty provided under this article for a violation of such provision.

9. Any penalties imposed under this section by the commissioner shall be appealed to the industrial board of appeals in accordance with article three of this chapter. Any penalties imposed under this section by the workers' compensation board or commissioner of taxation and finance shall be appealed in the same manner as the underlying violation.

10. Nothing in this section shall limit the availability of other remedies at law or in equity for a violation of this article.

11. Any fee or penalty assessed for a violation of this article shall
BE DEPOSITED INTO THE DEPARTMENT'S FEE AND PENALTY ACCOUNT.

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

(A) MAKING, OR THREATENING TO MAKE, A COMPLAINT TO AN EMPLOYER, CO-WORKER OR TO A PUBLIC BODY THAT RIGHTS GUARANTEED UNDER THIS ARTICLE HAVE BEEN VIOLATED;

(B) CAUSING TO BE INSTITUTED ANY PROCEEDING UNDER OR RELATED TO THIS ARTICLE; OR

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

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

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

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

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

"Employee" means a person engaged in one of the occupations enumerated in section three OF THIS ARTICLE or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his OR HER employment away from the plant of his OR HER employer;

"EMPLOYEE" SHALL ALSO MEAN FOR THE PURPOSES OF THIS CHAPTER ANY INDIVIDUAL PERFORMING SERVICES IN CONSTRUCTION FOR A CONTRACTOR WHO DOES NOT OVERCOME THE PRESUMPTION OF EMPLOYMENT AS PROVIDED UNDER SECTION EIGHT HUNDRED SIXTY-ONE-C OF THE LABOR LAW; "employee" shall also mean for the purposes of this chapter civil defense volunteers who are personnel of volunteer agencies sponsored or authorized by a local office under regulations of the civil defense commission, to the extent of the provisions of groups seventeen and nineteen; "employee" shall at the election of a municipal corporation made pursuant to local law duly enacted also mean a member of an auxiliary police organization authorized by local law; and for the purposes of this chapter only a newspaper carrier under the age of eighteen years as defined in section thirty-two hundred twenty-eight of the education law, and shall not include domestic servants except as provided in section three of this chapter, and except where the employer has elected to bring such employees under the law by securing compensation in accordance with the terms of section fifty of this chapter. The term "employee" shall not include persons who are members of a supervised amateur athletic activity operated on a non-profit basis, provided that said members are not also otherwise engaged or employed by any person, firm or corporation participating in said athletic activity, nor shall it include the spouse or minor child of an employer who is a farmer unless the services of such spouse or minor child shall be engaged by said employer under an express contract of hire nor shall it include an executive officer of a corporation who at all times during the period involved owns all of the issued and
outstanding stock of the corporation and holds all of the offices pursu-
ant to paragraph (e) of section seven hundred fifteen of the business
corporation law or two executive officers of a corporation who at all
times during the period involved between them own all of the issued and
outstanding stock of such corporation and hold all such offices except
as provided in subdivision six of section fifty-four of this chapter
provided, however, that where there are two executive officers of a
corporation each officer must own at least one share of stock, nor shall
S. 5847--F                          7

it include a self-employed person or a partner of a partnership as
defined in section ten of the partnership law who is not covered under a
compensation insurance contract or a certificate of self-insurance as
provided in subdivision eight of section fifty-four of this chapter, nor
shall it include farm laborers except as provided in group fourteen-b of
section three of this chapter. If a farm labor contractor recruits or
supplies farm laborers for work on a farm, such farm laborers shall for
the purposes of this chapter be deemed to be employees of the owner or
lessee of such farm. The term "employee" shall not include baby sitters
as defined in subdivision three of section one hundred thirty-one and
subdivision three of section one hundred thirty-two of the labor law or
minors fourteen years of age or over engaged in casual employment
consisting of yard work and household chores in and about a one family
owner-occupied residence or the premises of a non-profit, non-commercial
organization, not involving the use of power-driven machinery. The term
"employee" shall not include persons engaged by the owner in casual
employment consisting of yard work, household chores and making repairs
to or painting in and about a one-family owner-occupied residence. The
term "employee" shall not include the services of a licensed real estate
broker or sales associate if it be proven that (a) substantially all of
the remuneration (whether or not paid in cash) for the services
performed by such broker or sales associate is directly related to sales
or other output (including the performance of services) rather than to
the number of hours worked; (b) the services performed by the broker or
sales associate are performed pursuant to a written contract executed
between such broker or sales associate and the person for whom the
services are performed within the past twelve to fifteen months; and (c)
the written contract provided for in paragraph (b) [herein] OF THIS
SUBDIVISION was not executed under duress and contains the following
provisions:

S 4. Notwithstanding any other provision of the law to the contrary,
the provisions of section 861-c of the labor law, as added by section
one of this act, shall apply to and be utilized for all determinations
of a construction industry individual's employment status under the
labor law and the workers' compensation law, but not the tax law.
S 5. This act shall take effect on the sixtieth day after it shall
have become a law.