April 4, 2014

Contact: Richard Kaefer, Field Services Manager
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R.C. 2366

To: The Members of the Board

RE: Workers Compensation Board Subject Number 046-669
2014 Commercial Goods Transportation Industry Fair Play Act

The New York State Workers’ Compensation Board has just released Subject Number 046-669 which refers to the enactment of the New York State Commercial Goods Transportation Industry Fair Plan Act and the adoption of technical amendments to the Act.

A copy of Subject Number 046-669 is attached for your information and reference.

Questions regarding this subject number should be directed to the Workers’ Compensation Board.

Please distribute this information to the appropriate personnel within your organization.

Very truly yours,

Monte Almer

President

MA: jg
Encl.
Date: April 4, 2014

Overview:

On January 10, 2014, Governor Cuomo signed into law the New York State Commercial Goods Transportation Industry Fair Play Act (Act) (Chapter 558). This new law amends the Labor Law and the Workers’ Compensation Law to establish a presumption of employment in the commercial goods transportation industry. The technical amendments were signed by Governor Cuomo on March 17, 2014. The new statute will take effect on April 10, 2014, and for workers’ compensation purposes, applies to accidents which occur on or after that date.

The heart of the new law is Labor Law § 862-B which provides that any person performing commercial goods transportation services for a commercial goods transportation contractor is presumed to be an employee of that commercial goods transportation contractor. Commercial goods transportation contractor is broadly defined to include any sole proprietor, partnership, firm, corporation, limited liability company, association, or other legal entity permitted to do business within the state that compensates commercial vehicle drivers who possess any state-issued commercial driver’s license to transport goods in the state of New York. Labor Law § 862-B is incorporated by specific reference into Workers’ Compensation Law § 2(4). Therefore, any worker performing services for a commercial goods transportation contractor who is injured on or after April 10, 2014, will be presumed the employee of that commercial goods transportation contractor for workers’ compensation purposes, subject to the independent contractor test contained in the statute.

Application:

Under the Fair Play Act, a driver who possesses a state-issued driver’s license, and who transports goods in the state of New York while operating a commercial motor vehicle (as defined by law), is presumed to be the employee of a commercial goods transportation contractor (as defined by law) who compensates the driver.

a. For a person to be an independent contractor, the alleged employer must be required to pay the driver via a Federal Income tax form 1099, and must demonstrate all three of the following criteria:
   1. The person is free from control and direction in performing the job, both under contract and in fact;
   2. The person is performing services outside of the usual course of business for the company; and
   3. The person is engaged in an independently established trade, occupation or business that is similar to the service s/he performs.

b. The law also contains an 11-part test to determine when a sole proprietor, partnership, firm, corporation, limited liability company, association, or other legal entity that may also be considered to be a commercial goods transportation contractor will be considered a “separate business entity” from the commercial goods transportation contractor. If an entity meets all of the 11 statutory criteria, it will not be considered an employee of the commercial goods transportation contractor. Instead, it will be a separate business entity that is itself subject to the new law regarding its own employees. A separate business entity must:
   1. Be performing the service free from the direction or control over the means and manner of providing the service subject only to the right of the commercial goods transportation contractor to specify the desired result or federal rule or regulation;
2. Not be subject to cancellation or destruction when its work with the commercial goods transportation contractor ends;
3. Have a substantial investment of capital in the entity, including but not limited to ordinary tools and equipment;
4. Own or lease the capital goods and gain the profits and bear the losses of the entity;
5. Have the option to make its services available to the general public or others not a party to the business entity’s written contract set forth in item seven on this list, on a regular basis;
6. Provide services reported on a Federal Income tax form 1099;
7. Perform the services pursuant to a written contract, under the entity's name, specifying that it is an independent contractor or a separate business entity from the commercial goods transportation contractor;
8. Pay for any required license or permit in the entity's name or where permitted by law, pay for reasonable use of the commercial goods transportation contractor's license or permit;
9. Hire its own employees without the commercial goods transportation contractor's approval, subject to qualification requirements and state and federal laws, and pays the employees without reimbursement from the commercial goods transportation contractor;
10. Not be required by the commercial goods transportation contractor to represent itself as an employee of the commercial goods transportation contractor to its customers; and
11. Have the right to perform similar services for others on whatever basis and whenever it chooses.

Penalties:

An employer that willfully violates the Fair Play Act by failing to properly classify its employees will be subject to civil penalties of up to a $2,500 fine per misclassified employee for a first violation and up to $5,000 per misclassified employee for a second violation within a five-year period.

Employers also may be subject to criminal prosecution (a misdemeanor) for violations of the act with a penalty of up to 30 days in jail, up to a $25,000 fine, and debarment from bidding on or being awarded any Public Works contracts for up to one year for a first offense. Subsequent misdemeanor offenses would be punishable by up to 60 days in jail, up to a $50,000 fine, and debarment from bidding on or being awarded any Public Works contracts for up to five years.

The term "willfully violates" means a commercial goods transportation contractor knew or should have known that his, her, or its conduct violated the law. Workers' Compensation Law Judges will impose the civil penalties contained in the new law based on the evidence presented at the hearing.

Workers' Compensation Law Judges and the Bureau of Compliance may impose the penalties contained in the Fair Play Act. Penalties under the Act are in addition to all existing civil and criminal penalties for misclassification, failure to provide required coverage, or other violations of the Workers' Compensation Law, Labor Law, or Tax & Finance Law.

Questions regarding this release may be addressed to the Bureau of Compliance, 328 State Street, Schenectady, NY 12305-2318; (866) 298-7830.

Robert E. Beloten
Chair