Kaplin Stewart
Attorneys at Law

April 2014

About the Author
Karin Corbett, Esq.

610.941.2530
kcorbett@kaplaw.com

About the Practice
Construction Law Group

910 Harvest Drive, Suite 200
Blue Bell, PA 19422
T: 610.260.6000
www.kaplaw.com

Senator Casey Introduces Payroll Fraud Prevention Act of 2013

Recently, states have enacted legislation to prevent businesses in certain industries from "misclassifying" employees as independent contractors – a practice used by some to evade paying workers compensation, unemployment and other taxes for employees. For example, the Pennsylvania Contractor Work Place Misclassification Act specifically targeted misclassification of employees in the construction industry. Now, it appears that the Federal Government will enact similar legislation applicable to all industries, but allowing for "targeted audits" in industries thought to have high rates of misclassification of employees, which likely will include the construction industry.

Sen. Bob Casey (D-PA) has introduced Senate Bill 1687 called the "Payroll Fraud Prevention Act of 2013" designed to prevent misclassification of independent contractors at the Federal level. The Act would allow companies to use non-employee workers, but would penalize employers that misclassify an employee by expanding the scope of the Fair Labor Standards Act to cover "non-employees" as a new category of workers. The Act defines a "covered person" as an employee, a non-employee or a corporation formed by an individual (in some instances) where the "creation or maintenance of such entity is a condition" for providing labor and service to the individual.

The Act would affect all businesses with workers, whether employees or non-employees, by imposing recordkeeping requirements. Specifically, businesses would be tasked with identifying each individual as an employee or non-employee and providing each individual with a written notice (i) informing the individual of his classification of either employee or non-employee, (ii) directing the individual to DOL employee rights website (newly authorized by the act) or other appropriate resources, and (iii) directing the individual to contact the DOL if the individual suspects he has been misclassified. All employers would be required to provide such notice within 6 months of the Act's effective date, and thereafter to each employee upon commencing employment or labor. Any covered individual not provided with timely notice shall be presumed an employee. That presumption may only be rebutted through "clear and convincing evidence".

Penalties for non compliance are severe. Businesses would be subject to civil penalties for any failure to provide a notice for each individual in an amount of $1,100 for a first offense and up to $5,000 for a second offense or a "willful" violation. For a business with many workers, the collective fine could be significant. Willful violations of the minimum wage or overtime laws in instances where the employer misclassified the worker would trigger triple damages. The Secretary of Labor would be authorized to impose additional penalties where an employee is misclassified to avoid paying for unemployment compensation. The DOL would be authorized to report misclassification to the IRS and to conduct "targeted audits" of employers in industries with "frequent incidences of misclassifying employees as non-employees."

The Act's broad application, new record keeping requirement, and strict penalties will impose upon all businesses with workers, especially those in the construction industry. Should SB1678 become law, be sure your company is compliant.