

NEWS & INSIGHTS

Criminal charges for Act 72 construction workplace misclassification violations

INSIGHTSARTICLE

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Pennsylvania recently [made national headlines](#) for seeking criminal charges against a York County drywaller for an alleged violation of Act 72, the [Construction Workplace Misclassification Act](#). This will be the first time that criminal charges have been levied against a contractor under the act. Prosecution of the matter will be handled by the Delaware County District Attorney's Office with assistance from the Fair Labor Section of Pennsylvania's Office of Attorney General.

The act has been on the books for approximately a decade; however, the first several years resulted in minimal fines and limited enforcement. A few years after creation, in 2013, the state investigated 25 cases and levied \$2,500 in monetary penalties in total for the entire state. Enforcement in recent years has escalated significantly. In 2018, the last reported data point, the state levied monetary penalties of \$566,845. Now, the first criminal prosecution is pending. An intentional violation of the act can result in a misdemeanor.

Act 72 applies to all construction companies working on all types of projects — public, private, residential or commercial. To comply, every independent contractor must have a written contract in place. Further, each relationship must be analyzed to ensure that the subcontractor is truly an independent contractor that controls its own work and the pricing structure.

Certain factors take priority when analyzing the relationship:

1. Is there a written contract?
2. How is the pricing and scope determined?
3. How is the subcontractor organized—are they a standalone company that holds itself out to the public/industry for work?
4. Does the subcontractor take the risk of profit/loss on the work?
5. Who provides the tools, material and training?
6. Who is responsible for insurance, tax withholdings, Unemployment Compensation (UC) and Workers Compensation (WC)?
7. Various other factors can affect the analysis.

An important point to consider is that even if the subcontractor is truly an independent contractor, if the contract is non-existent, incomplete or lacking precision, it invites greater scrutiny and risk of liability.

Update your contract documents and contracting practices

Best practice is to update your contract documents and business practices to account for the increased enforcement of Act 72. You should review and update your standard contracts every two years, in general, to account for changing trends and practices in the industry. Whether updating old forms or creating new custom forms, it is important to use trusted legal counsel and also receive feedback from related professionals such as insurance brokers. It is an interactive process to ensure that the terms accurately state the points that align with your business interests.

Saxton & Stump attorneys [Ron Pollock](#) and [Matt Chabal](#) are available to discuss standard and custom contract forms and how our [Construction Law Group](#) can assist with contract reviews.

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