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Criminal Penalties For Misclassifying Independent Contractors?

Yes, you read correctly. Criminal liability for worker misclassification has been proposed a few times and in a few places, but criminal penalties are a growing trend. Pennsylvania Gov. Edward G. Rendell (R) has just signed the Construction Workplace Misclassification Act ([H.B. 400](#)), to make it a **criminal** offense for a contractor to knowingly misclassify an employee as an independent contractor. The more times you violate it, the worse the punishment. Other states imposing criminal penalties for at least some worker misclassifications include New York, Nebraska, Connecticut, Illinois, Massachusetts and New Jersey, to name a few.

Pennsylvania's new law also extends criminal liability to anyone **contracting with** the contractor who is aware the contractor is misclassifying workers. You can get out of the latter liability by showing that in good faith you thought the workers were **truly** independent contractors. But defending yourself in one of these messes will be unpleasant if not downright frightening.

Pennsylvania's rifle shot law is aimed like a laser at the construction industry, which isn't exactly in a rosy financial position anywhere. Yet it's also clear that the construction industry has long been a kind of breeding ground for worker classification abuses that often swarm like mosquitoes. Many construction workers who are subject to the kinds of direction and control that clearly signals employee status seem nevertheless to be labeled "independent contractors."

New York's law, the Construction Industry Fair Play Act, [Senate Bill 5847](#), similarly targets the construction industry. It goes into effect on October 26, 2010, having been signed by Governor Paterson on August 27, 2010. See <http://www.labor.ny.gov/pressreleases/2010/s.shtm> New York's law is more complex than Pennsylvania's, but its intent is clearly the same: to make it tougher for those in the construction industry to escape the big liabilities—tax and otherwise—that come with having employees. New York's law requires posting too (see <http://www.labor.ny.gov>) and that may be seen as a kind of Miranda warning that brings further worker complaints and prompt investigations. See [Miranda Like Warnings To Independent Contractors?](#)

The independent contractor vs. employee line is inherently factual, and there's no litmus test. See [Ten Tips For Drafting Independent Contractor Agreements](#) and [New Age Scrutiny of Employee vs. Independent Contractor Liabilities](#). But in some cases there's little justification or factual support for the "independent contractor" classification slapped on workers. The lost tax revenue is huge, as are other consequences.

In fact, it's hard to imagine a more consequential distinction than the employee vs. independent contractor line. It impacts federal and state income and employment taxes, worker's compensation, unemployment insurance, pensions and other benefits, and many state and federal employment laws including overtime, wage and hour, discrimination, and more.

Pennsylvania's new [Construction Workplace Misclassification Act](#) establishes rigid criteria for differentiating independent contractors from employees in the construction industry. A worker in construction qualifies as an independent contractor only by meeting all three of these conditions:

- Have a written contract;
- Be free from control, both in the contract and in fact; and
- Customarily be engaged in an independent trade performing the services.

The new law states explicitly that the fact taxes are not withheld has no bearing on the classification decision. Although signed into law October 13, 2010, it won't take effect for 120 days after signature.

There are also pending bills at the federal level, most notably the pending [Fair Playing Field Act of 2010](#).

For further reading, see:

[White House On Contractor Vs. Employee: There Will Be Blood](#)

[IRS Gives 10 Tips on Employees Versus Independent Contractors](#)

[Ten Things IRS Wants Workers to Consider When Contractors Become Employees](#)

[Ten More Consequences of Reclassifying Independent Contractors as Employees](#)

[Ten Consequences of Reclassifying Independent Contractors as Employees](#)

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