

The logo for Astrachan Gunst Thomas features a stylized, swirling blue graphic behind the company name. The name is written in a clean, sans-serif font, with 'astrachan' in black and 'gunst thomas' in blue.

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Protect Your House

By: Julie R. Rubin, Esq.

My nephew, who my sister calls The Little General, is just old enough to appreciate the holiday season this year. What better way to initiate him to holiday season rites of passage than with a gingerbread house? Have you ever tried to build one of these things? And have you ever tried to build one of these things with a small person running amuck in your kitchen high on icing? It's an experience. Just as I was picking up the last of the Golden Grahams off the floor (they make for excellent roof shingles), the phone rang.

It was a dear client of mine, Bruce Planter. I thought he was calling to extend some holiday cheer. No such luck. "Julie, I got some notice from DLLR about an audit and I'm beside myself." The notice announced that the State Department of Labor, Licensing and Regulation was going to conduct an audit of Bruce's company to determine its compliance with the Workplace Fraud Act. I told Bruce I could be at his office in one hour. "In the meanwhile," I said, "gather together all the independent contractor agreements you can lay your hands on. I know what this is about." Holiday cheer this was not.

Bruce owns a commercial and residential roofing company out of Baltimore City and has been in business since 1984. With the exception of his office staff, Bruce's workforce is composed of independent contractors who, at any given moment, work for various contractors in the area. When the construction market fell victim to the economy, several projects for which his company had been hired were put on hold or canceled. Many of the workers he cut loose had no other projects to work on and, as a result, filed for unemployment benefits with the State. When Bruce received a notice from the State that a worker had filed for unemployment, he checked the box indicating that the worker was not an employee of his company. As the construction market went from lean to anemic, this scene played out several times over a 12-month period. Then came the notice of audit from DLLR.

When I got to Bruce's office, he led me to a back office he had cleared out so we could review what he had and could talk about what he should expect. The paltry stack of papers he handed me warned that this was going to be ugly. Bruce estimated that he had gone from about 35 independent contractors in 2007 to approximately 20 in 2009. He handed me 12 independent contractor agreements and promised he would continue to look for others.

Bruce's company had been targeted for an audit under Maryland's new Workplace Fraud Act, which took effect on October 1, 2009. The chief aim of the WFA is to tighten standards

under which workers in the construction and landscaping industries are classified as either employees or independent contractors. But don't stop reading if this isn't you. Although the WFA principally focuses on the construction and landscaping fields, every Maryland employer should sit up and take notice, because the WFA covers every employer with respect to unemployment insurance. Plus, Governor O'Malley has announced that he intends to make the rounds to many other industries, creating strict standards under which employers must operate in designating a worker either an employee or an independent contractor, or risk stiff fines. (Can you hear the coins filling the State's piggy bank?)

On August 28, 2009, the DLLR proposed regulations to flush out the WFA. The Unemployment Insurance division of the DLLR is empowered to conduct random and targeted audits of an employer's classifications. When a worker seeks unemployment insurance benefits and the identified employer indicates that the worker was not a covered employee, a silent alarm is triggered. And somewhere, deep in the bowels of the DLLR, an investigator grins and prepares to pounce.

And this is how Bruce got audited. Every time he informed the DLLR that a worker was not an employee, he tripped the alarm. Finally, after several such instances in a row, the DLLR decided to audit his company to determine whether he properly designated his independent contractors as such, or whether he misclassified them to save money on overtime, insurance and other expenses, and to avoid owing his workers legal duties relating to discrimination and other employment-related civil liberties.

Here's the kicker: the WFA creates a rebuttable presumption that all workers are employees. Let me say that again: *all* workers are presumed to be employees until and unless the employer satisfactorily demonstrates to the contrary. I can hear the chorus now: "I have independent contractor agreements," you all say. Not enough. Not even close. Contracts are a minor factor. If challenged by the State, you must be able to show the following things in order to demonstrate that your designation of a worker as an independent contractor is correct:

1. the individual is free from control and direction regarding performance of the work;
2. the individual is customarily engaged in an independent business or occupation of the same nature as that involved in the work; and
3. the work is outside of the usual course of business of the employer or is performed outside of the employers' place of business.

And, now, for the moment you've all been waiting for: The Fines. Although the regulations do not impose penalties for mistaken misclassifications, if you fail to "come into compliance" within 45 days following a determination that you have misclassified an employee as an independent contractor, the DLLR can levy a penalty of up to \$1,000 per misclassified employee and require you to pay restitution to any individual improperly designated. If the DLLR can establish a "knowing violation" of the WFA, the DLLR is empowered to impose the following penalties:

1. \$5,000 per misclassified employee;

2. Up to \$10,000 if the employer previously has been found in violation; and
3. Up to \$20,000 per misclassified employee for an employer found to be in violation three or more times.

In addition to putting your designations under a high-powered microscope, the WFA places affirmative obligations on Maryland landscaping and construction employers. As a result of the WFA, independent contractor agreements in these industries must now contain a litany of statements, including the following information:

1. The worker is hired as an independent contractor and is responsible for all tax obligations;
2. The worker will perform work free of the employer's control;
3. The worker is not covered by wage and hour laws, anti-discrimination laws, or workplace safety laws; and
4. A notice called the "Notice to Independent Contractors and Exempt Persons", which you can download at www.dllr.state.md.us.

The regulations also burden these employers with intricate record-keeping requirements, including tracking contractors' hours by day and week. If your business is like many I know, you may very well pay your contractors a fixed project or piece rate, so tracking hours is pointless. Not anymore. Other record-keeping requirements that present a major hassle include keeping a record of all licenses or certifications held by your contractors. I haven't any earthly idea why whether you keep a running count of your contractors' licenses is determinative of whether you've made a proper designation that a contractor is indeed a contractor, but there you go.

Bruce was in bad shape. He had woefully few written contracts. Plus, for many of the workers he designated independent contractors, he couldn't demonstrate the necessary control and related factors, and he had zero records of his contractors' licenses. He did have a fair number of records regarding hours worked because his guys are hourly, but by and large Bruce flunked the audit. I managed to keep him from being fined, because his violations were not "knowing," but the amount of work it took to "come into compliance" was backbreaking.

How can you avoid being in Bruce's position? Conduct a self-audit to evaluate your designations under these guidelines, and contact your attorney to review your independent contractor agreements and to help make sure you are otherwise compliant with the WFA. Lastly, be on your best behavior. It doesn't pay to be defensive or to play coy with the DLLR. The investigator in charge of Bruce's audit expressly cited Bruce's prompt response to the audit notice and good faith cooperation in the investigation as major considerations in the DLLR's finding that Bruce's offenses were unintentional.

If you build more than gingerbread houses, this new law can take a bite out of you for sure. But none of us is safe from a workplace audit. Do what it takes to get your house in order.

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