

# Employee or Independent Contractor? The stakes are high in Illinois

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Illinois passed the Employee Classification Act in 2008. It was amended in 2013. (820 ILCS 185/1 et seq.) In a decision issued February 25, 2014, the Illinois Supreme Court rejected a constitutional challenge to the Act. This recent case is a good reminder to employers engaged in the construction industry in Illinois that when it comes to classifying employees as independent contractors, the stakes are high.

The case of *Bartlow v. Costigan* involved a business in Franklin County, Illinois known as Jack's Roofing. The Illinois Department of Labor received a complaint in 2008 that Jack's Roofing was misclassifying employees as independent contractors. An investigation ensued with Jack's producing over 750 documents to the Illinois Department of Labor. The IDOL investigation determined that Jack's misclassified ten individuals for between 8 and 160 days in 2008. The bill? \$1,683,000.00. Gulp.

Jack's filed a complaint in circuit court, asking the court to issue an injunction against the IDOL and also asking the court to declare the Act unconstitutional. The court denied both requests. The case made its way through the Appellate Court and finally to the Illinois Supreme Court.

The decision, which is basically an analysis of the constitutional challenges, contains a good discussion of the Act itself and the serious consequences that face contractors who misclassify employees as independent contractors.

**Who is covered by the Act - and who isn't?**

The Act provides that any individual "performing services" for a construction contractor is deemed to be an employee of the contractor. The definition of "performing services" is very broad and covers just about any service that can be provided to a contractor. Basically, there is a broad presumption anyone performing a service for a construction contractor will be considered an employee, not an independent contractor, no matter how the person is classified by the contractor.

There are exceptions to this rule. For example, true independent contractors, sole proprietors, or partnerships are exempted from being treated as employees, if they meet certain statutory criteria to prove they are effectively operating independently from the contractor.

The statutory criteria for the exemption includes:

- The individual is free from control or direction from the contractor,
- The service performed is outside the usual course of services provided by the contractor,
- The individual is engaged in an independently established trade, occupation, business or profession, and
- The individual is deemed a legitimate sole proprietor or partnership.

**Who can make a complaint?**

Any interested party can file a complaint with the IDOL if there is a reasonable belief the contractor is misclassifying employees. IDOL has the power to then conduct an investigation, including visits and inspections, and a review of any documentation necessary to determine whether the individual is an employee or an independent contractor.

**What if IDOL finds a violation?**

If the IDOL believes the Act has been violated, it can issue an order telling the contractor to cease and desist from further violations of the Act. It can also take action to eliminate the effect of the violation. Also, it can collect the amount of any wages, salary, employment benefits, or other compensation the misclassified person lost. Finally, it can assess a civil penalty.

If IDOL believes there has been a misclassification of an employee or there has been retaliation against a complainant or person testifying in an investigation, IDOL must notify the contractor of its finding, its proposed relief and the penalties assessed and the matter will then be referred to an Administrative Law Judge who will conduct a formal hearing in accordance with the Illinois Administrative Procedure Act. The decision of the Administrative Law Judge will be enforced by the Illinois Attorney General.

**How much are the civil penalties issued by the IDOL?**

For a first violation, the penalty is \$1,000 for each day of misclassification. This goes up to \$2,000 per day for repeat violations. If the violation is "willful" (or if the contractor obstructs the investigation), IDOL can double the amount. The Act also provides individual liability to any officer or agent of a corporation who knowingly permits an employer to violate the Act.

**Are there criminal penalties?**

Yes. Willful violations of the Act constitute a Class C misdemeanor. If the contractor has a second or subsequent violation within a 5 year period, it will be treated as a Class 4 felony. It is also a Class C misdemeanor for a contractor to induce a person to waive any provision of the Act. These crimes can be prosecuted by the Illinois Attorney General or the appropriate State's Attorney.

Also, IDOL can bar a contractor from any state contracts for second or subsequent violations within a 5 year period.

**Can the employee bring his or her own action?**

Yes. The employee can file an action in circuit court to recover lost wages and benefits. The employee can also receive compensatory damages of up to \$500 for each violation, 10% of any civil penalty imposed, and attorney fees. The employee has 3 years from the date of final services in which to file this action.

The Act also permits the employee to sue the contractor if the contractor terminates the employee for exercising his or her rights under the Act.

**Does the contractor have reporting requirements?**

Yes. The contractor must make annual reports to the IDOL on or before January 31 of the taxable year in which payments are made to individuals, sole proprietors, and partnerships who are not classified as an employee by the contractor. The report must contain the name, address and I.D. number of the contractor and the entity to whom payment was made and the total amount paid to that entity. These reports are confidential.

**By Courtney Cox**

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