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### **ILLINOIS LEVIES LARGEST CIVIL PENALTY UNDER EMPLOYEE CLASSIFICATION LAW**

#### **State Cracking Down on Misclassification of Workers As Independent Contractors**

In the largest enforcement finding to date under Illinois' new Employee Classification Act (ECA), the Illinois Department of Labor (IDOL) has imposed a \$328,500 civil penalty against a Chicago-area contractor that has consistently mischaracterized its employees as independent contractors.

Illinois is among several states of late that have taken the initiative in investigating and correcting employer misclassification of workers as independent contractors rather than as employees.

IDOL has issued a final determination and notice of violation under the ECA against Elmwood Park-based Mega Builders Inc. and its president Andrzej Kobiela. The determination faulted Mega Builders for failing to classify 18 individuals as employees and failing to maintain proper records as required under the ECA.

IDOL also penalized Mega Builders for engineering improper schemes in which workers incorporated as separate business entities to evade the ECA. Specifically, IDOL determined that Mega Builders had failed to establish that four such entities were legitimate sole proprietorships or partnerships under the act, rather than employees.

In light of the violations, IDOL assessed civil penalties of \$1,500 per day for 218 total days of misclassification. An additional penalty of \$1,500 was levied for failure to maintain proper records under the act.

Mega Builders could not be reached for comment on the Labor Department's determination.

Bert Rodriguez, Assistant Director of IDOL, said the Mega Builders situation is IDOL's biggest ECA case so far in terms of civil penalties. He said notices of violation have been issued in eight cases, including Mega Builders, since the ECA became effective nearly two years ago. Rodriguez said assessed penalties total approximately \$700,000 in those eight cases.

Rodriguez declined to discuss the Mega Builders case in detail, noting that it is subject to further investigation and litigation. He said, however, that the company has not notified the department that it intends to seek a review of the determination. Nor has the builder communicated its intention to pay the civil penalty. Rodriguez said IDOL would likely seek a court order compelling Mega Builders to comply with the notice of violation.

"I would imagine some of these, especially the larger violations with larger penalties, would probably be litigated



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and we would have to get the Attorney General's office involved," Rodriguez said. "They have been very helpful with our other enforcement efforts."

Jim Allen, President of the Bricklayers and Allied Craftsmen Local 21, applauded the Labor Department's action against Mega Builders and its commitment to the ECA. Allen said he has been aware of Mega Builders' business practices for years. Local 21 assisted the department in its investigation.

"We've been going after the big ones and there are hundreds just like him in Illinois," Allen said. "[Mega Builders has] been playing the con and beating the system for probably 15 years and now it has finally caught up with [them]."

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ECA became effective on Jan. 1, 2008, promising to clamp down on the rampant misuse of the independent contractor designation by unscrupulous contractors seeking to undercut competitors and avoid a menu of tax, payroll, and safety obligations.

The law deals with the problem by placing the traditional employee designation on all construction workers unless it is shown that the individual performing services is free from control or direction; the services provided by the individual are outside the usual course of services provided by the contractor; the individual is engaged in an independently established trade, occupation or profession; and/or, the individual is deemed a legitimate sole proprietor or partnership.

Allen said the Labor Department's notice of violation is particularly noteworthy because of its finding with respect to individuals who sought to skirt the law through incorporation as a separate business entity.

"When the misclassification law came into effect, [Mega Builders] made employees incorporate," he said. "This was their loophole for beating the new law. They were actually telling people, 'If you want to work for us, you've got to form your own corporation.' Well, the Department of Labor isn't buying it."

Rodriguez said the incorporation scheme was a common misconception circulating among contractors after the ECA was enacted. The issue came up during the department's outreach sessions with employers last year. Rodriguez said the Mega Builders case should put contractors on notice that the department will look closely at any incorporated entities to determine their legitimacy under the ECA.



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“Some contractors were under the impression that their people could get an incorporation certificate through the Secretary of State and then they were OK. No, that’s not the case,” he said. “If the individual is incorporated but he is being treated as an employee, incorporation is insufficient. You can and you will be found in violation under the act.”