

December 2011

## U.S. Department of Labor Targets Connecticut and Rhode Island Construction Industry Employers

By Patricia Reilly and Matthew Curtin

Connecticut and Rhode Island construction industry employers are facing a significant increase in government scrutiny of their labor and employment practices over the next several years. On November 30, 2011, the Hartford office of the U.S. Department of Labor's Wage and Hour Division ("U.S. DOL") issued a press release announcing a "multiyear enforcement initiative" aimed at improving what it sees as "widespread noncompliance with minimum wage, overtime and record-keeping provisions of the Fair Labor Standards Act" in the construction industry in both Connecticut and Rhode Island. The stated goal of the investigation initiative is to "remedy systemic violations and promote sustained compliance among contractors and subcontractors working on construction projects."

### A Multi-Year Enforcement Initiative

The U.S. DOL's enforcement initiative is set to span several years, with no set end date. The investigations will target "large" construction projects in both Connecticut and Rhode Island. Investigations will be wide ranging, with the U.S. DOL or its state counterpart scrutinizing any and all employment practices of the general contractors, subcontractors, or any other business entity providing services at a job site. Additionally, investigators will actively reach out to employees and unions in an effort to educate them about the investigative efforts and enlist their participation in the initiative.

The current initiative raises the profile of enforcement measures that have been ongoing for several years. Since 2008, the U.S. DOL's Hartford office has conducted 183 investigations of construction industry employers throughout Connecticut and Rhode Island. As a result, construction industry employers were forced to pay nearly \$3.3 million in back wages for 1,226 employees. Neil Patrick, the U.S. DOL's Hartford district director, stated in the press release, "[t]he Wage and Hour Division is employing new strategies to combat this 'race to the bottom' culture so that construction workers will not see their wages and benefits undercut, and law-abiding employers will not face unfair competition from contractors who take advantage of workers so eager for a job that they will accept substandard wages and unsafe conditions."

Moreover, the Connecticut Department of Labor ("Connecticut DOL") regularly conducts independent contractor misclassification investigations that result in overwhelming civil penalties and crippling stop work orders. For example, the Connecticut DOL issued 17 stop work orders due

to independent contractor misclassification for the period of October 27 through November 3 alone. In addition, while not limited solely to the construction industry, the Connecticut DOL reports that overall it issued 159 stop work orders and recovered \$6 million in unpaid wages for the prior fiscal year as a result of investigations into violations of prevailing wage laws, workers' compensation laws, child labor laws, recordkeeping laws, and overtime and minimum wage laws. The Connecticut DOL acknowledged that many of these investigations targeted construction projects.

In an effort to enhance their employment practices investigations, the U.S. DOL and the Connecticut DOL executed a memorandum of understanding that will allow the agencies to coordinate sharing of information and resources. This sharing of information and resources will surely result in more frequent and aggressive investigation of the construction industry for the foreseeable future.

## Increased Scrutiny of Employment Practices

While the scope of the investigations will be essentially unfettered, there are certainly some common issues that investigators will be watching for. Some of the more common targeted practices construction industry employers may expect investigators to scrutinize include:

- **Independent contractor misclassification:** Over the past several years, the U.S. DOL and its Connecticut counterpart have vigorously pursued construction employers that misclassify employees as independent contractors. Federal and state law, however, utilize different legal standards for determining independent contractor status, so a review of contractor classification is essential to ensure compliance with the applicable jurisdiction.
- **Noncompliance with minimum wage:** The federal minimum wage is currently \$7.25 per hour, while the state minimum wage is \$7.40 per hour in Rhode Island and \$8.25 per hour in Connecticut. Employers must comply with the more stringent requirement established by applicable state law.
- **Noncompliance with overtime pay:** In both Connecticut and Rhode Island, employers must pay covered employees one-and-one-half times their regular rate for all hours worked in excess of 40 hours per week.
- **Payment for all compensable hours worked:** Simply speaking, employers must pay employees for all hours the employee performs work for the employer. Common noncompliance issues in the construction industry arise when employers fail to pay employees for donning and doffing, compensable travel time between work sites, waiting time, compensable meal periods, or post-project activities such as clean up duties.
- **Violation of child labor laws:** There are a myriad of child labor laws under the FLSA and Connecticut and Rhode Island law regulating the hours and types of jobs minors may perform.

This list is non-exclusive. The above highlighted topics detail some of the major noncompliance issues the government is known to target, but investigators will look to remedy any violations of applicable law. Investigators will have broad authority to enter a worksite and scrutinize any and all employment practices of the on-site employers. It will therefore be important for targeted employers to ensure they are in compliance with all relevant labor and employment laws.

## What Employers Can (and Should) Do

In response to this multi-year enforcement initiative, construction industry employers must proactively ensure that their pay practices are in compliance with the FLSA and Connecticut and Rhode Island wage and hour law, as applicable. The U.S. DOL's announcement only highlights the fact that it will not focus solely on high profile noncompliance issues such as independent contractor misclassification, failure to pay overtime, and faulty recordkeeping. Moreover, with the Connecticut DOL and the U.S. DOL now sharing information and resources, construction industry employers can expect frequent and aggressive investigations.

If targeted employers fail to ensure compliance with applicable employment laws, an investigation could result in stop work orders, payment of double back wages to affected employees, civil fines, or even criminal penalties. Given the potential for serious financial and/or criminal penalties that could result from a finding of noncompliance with applicable employment laws, construction industry employers in Connecticut and Rhode Island should strongly consider conducting compliance audits with the assistance of experienced outside counsel. Correcting a noncompliance problem before a surprise U.S. DOL investigation occurs is well worth the effort.

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