

Are You an Employee or Independent Contractor?

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Are you working in the construction industry or know someone who is? Well, there are new laws going into effect that will apply to individuals who provide “public or private sector commercial or residential building construction or improvement services.” The Minnesota Department of Labor and Industry will begin requiring independent contractor exemption certificates for work performed by individuals as of January 1, 2009. If you or someone you know falls into this category, read on.

In Minnesota, you are considered an employee if you are an individual who “performs services for a person that are in the course of the person’s trade, business, profession, or occupation is an employee of that person and that person is an employer of the individual” and do not require an exemption certificate. M.S.A. §181.723, Subd. 4 states “[a]n individual is an independent contractor and not an employee of the person for whom the individual is performing services in the course of the person’s trade, business, profession, or occupation only if (1) the individual holds a current independent contractor exemption certificate issued by the commissioner; and (2) the individual is performing services for the person under the independent contractor exemption certificate as provided in subdivision 6. The requirements in clauses (1) and (2) must be met in order to qualify as an independent contractor and not as an employee of the person for whom the individual is performing services in the course of the person’s trade, business, profession, or occupation.” This distinction is being made because of the legislature’s concern that some persons should be considered employees — not independent contractors. Some businesses are cheating the system by considering true employees as independent contractors so the employer does not have to pay workers compensation, health and retirement benefits and unemployment to these individuals. In addition, these businesses are not held accountable for OSHA, labor standards or child labor laws.

With this new law requiring the individuals who are independent contractors to pay for and obtain an independent contractor exemption certificate, the Department is assuring itself that these individuals are truly independent and therefore are exempt from employee/employer requirements. The independent contractor must apply for and be granted an exemption certificate by completing an application and paying a \$150 fee. The application will be available on-line (www.doli.state.mn.us/ic) beginning September 1, 2008 and can be filed either by mail or fax. The Department of Labor and Industry’s website has additional information regarding the exemption certificate.

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Information required for the application includes: the individual's full name, residential address and telephone number, individual's business name, address and telephone number, the services for which a certificate is being requested, the individual's social security number, the individual's or the individual's business federal identification number, any documentation the department determines is required to make a determination, and a sworn statement that all of the nine conditions found in M.S.A. §181.723, Subd. 5(a)(8) are met. The Department will have 30 days from receiving the completed application and fee to either grant or deny the application. The exemption certificate is valid once issued for two years unless revoked by the department or canceled by the individual. The application can be denied if it is not complete, if the fee is not paid or if the individual does not (or no longer) meet all of the nine conditions. The department can revoke the certificate if (1) the individual commits any of the actions set out in M.S.A. §181.723, Subd. 7 or (2) fails to cooperate with the department investigation into the continued validity of the certificate. If an individual commits any of the actions prohibited under the statute, an administrative penalty of up to \$5,000 for each violation may be assessed.

So, if you want to continue to work as an individual independent contractor, every two years you are going to have to apply for an independent contractor exemption certificate, pay \$150 in application fees and comply with M.S.A. §181.723 at all times. If you want to avoid this requirement our firm can help you form an entity under which you can perform your construction services. M.S.A. §181.723 does not apply to entities and the Department cannot issue an exemption certificate to a corporation, limited liability company or partnership.

Our law firm can assist you with the intricacies of setting up your entity and make sure that you are compliant with Minnesota laws. Call our office at 952.226.1202 for more information and to schedule an appointment to discuss the above requirements. Also, check out our website www.schmidobrienlaw.com for client intake sheets.

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M.S.A. §181.723, Subd. 2

M.S.A. §181.723, Subd. 3

M.S.A. §181.723, Subd. 5(c)

Prohibited activities. (a) An individual shall not:

- (1) perform work as an independent contractor who meets the qualifications under subdivision 6 without first obtaining from the department an independent contractor exemption certificate;
- (2) perform work as an independent contractor when the department has denied or revoked the individual's independent contractor exemption certificate;
- (3) transfer to another individual or allow another individual to use the individual's independent contractor exemption certificate;
- (4) alter or falsify an independent contractor exemption certificate;
- (5) misrepresent the individual's status as an independent contractor; or
- (6) make a false material statement, representation, or certification; omit material information; or alter, conceal, or fail to file a document required by this section or any rule promulgated by the commissioner under rulemaking authority set out in this section.

(b) A person shall not:

- (1) require an individual through coercion, misrepresentation, or fraudulent means to adopt independent contractor status;
- (2) knowingly misrepresent that an individual who has not been issued an independent contractor exemption certificate or is not performing services for the person under an independent contractor exemption certificate is an independent contractor; or
- (3) make a false material statement, representation, or certification; omit material information; or alter, conceal, or fail to file a document required by this section or any rule promulgated by the commissioner under rulemaking authority set out in this section.

(c) A person for whom an individual is performing services must obtain a copy of the individual's independent contractor exemption certificate before services may commence. A copy of the independent contractor exemption certificate must be retained for five years from the date of receipt by the person for whom an individual is performing services

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