Independent Contractor Misclassification Considerations: Qui Tam, Private Right of Action and Administrative Enforcement Mechanisms

ABA LEL Panel Concerning
Independent Contractor
Misclassification Issues

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A qui tam action is commonly defined as a "whistleblower" claim brought by an informer under a statute which establishes a penalty or forfeiture for the commission or omission of a certain act, and which additionally provides that the same shall be recoverable in a civil action with part of the recovery to go to the person bringing the action (i.e., informer) and the remainder to go to the state, federal government or some other institution. See, e.g., McKenzie v. Bellsouth Telecommunications, Inc., 219 F.3d 508, n.1 (6th Cir. 2000); Mitchell v. Tenneco Chemicals, Inc., 331 F. Supp. 1031, 1032 (1971); Bass Anglers Sportsman's Soc. of America v. Scholze Tannery, Inc., 329 F. Supp. 339, 344 (1971). As the Seventh Circuit noted,

> "Qui tam suits by definition involve suits brought by private parties to assist the executive branch in its enforcement of the law, the violation of which affects the interest of the government, not the individual relator, whose only motivation in bringing the suit is to recover a piece of the action given by statute. So when a legislative body enacts provisions enabling qui tam actions, that act carries with it an understanding that in such suits it is the government, and not the individual relator, who has suffered the injury resulting from the violation of the underlying law and is therefore the real plaintiff in the action."

U.S. ex rel. Hall v. Tribal Development Corp., 49 F.3d 1208, 1212 (7th Cir. 1995).

Several courts have explicitly held that there is no common law right to maintain a qui tam action. Put another way, the right to maintain a qui tam action must be authorized pursuant to a statute. See, e.g., Hall, 49 F.3d at 1212; U.S. ex rel. Burnette v. Driving Hawk, 587 F.2d 23, 24 (8th Cir. 1978); Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81, 84 (2nd Cir. 1972); Williams v. Wells Fargo & Co. Express, 177 F. 352, 355 (8th Cir. 1910). For instance, in U.S. ex rel. Marcus v. Hess, the statute provided that "suit may be brought and carried on by any person, as well for himself as for the United States." Connecticut Action Now, Inc., 457 F.2d at 84 (citing to U.S. ex rel. Marcus v. Hess, 317 U.S. 537, 540 (1943)). The most popular statute in today's qui tam jurisprudence is the False Claims Act ("FCA"). The qui tam authorization provision of the FCA provides that "[a] person may bring a civil action for a violation ...of this title for the person and for the United States Government. The action shall be brought in the name of the Government." 31 U.S.C. §3730(b)(1). Thus, while statutory authorization for a qui tam suit can be either express or implied, the terms and structure of the particular statute are decisive. Connecticut Action Now, Inc., 457 F.2d at 84.

ISSUE: *Whether a qui tam action can be maintained against a contractor, who identifies its workers as independent contractors, rather than employees, to compel the contractor to pay for social security, workers' compensation and unemployment benefits for its employees.*

I. SOCIAL SECURITY

A. Background

The Social Security Act ("SSA") establishes a federal insurance program for the benefit of the aged, blind and disabled, and their dependents. See generally, 42 U.S.C. §§401, *et seq*. The Federal Insurance Contributions Act ("FICA") is one of the taxing statutes designed to fund the program set up by the SSA. Under the requirements of FICA, employees and employers are liable for certain employment taxes to support the social security and medicare systems. Salazar v. Brown, 940 F. Supp. 160, 162 (1996). In particular, the employer is required to collect from each employee the FICA tax on wages by withholding the taxes from the employee's paycheck and periodically remitting them to the IRS. See 26 C.F.R. §31.3102-1(a). Moreover, the employer is required to pay its own tax to the IRS (i.e., an excise tax), which is generally an amount equal to the employee's tax. 26 U.S.C. §3111(a).

B. Issue: *Whether a qui tam suit can be maintained to force an employer to make social security contributions on behalf of its employees.*

There are *no* express provisions in either the Social Security Act or the Federal Insurance Contributions Act authorizing a qui tam action against an employer for its failure to make social security contributions. Rather, the case law has focused on the issue of whether a *private cause of action* exists under the FICA or the SSA to force employers to make the appropriate social security contributions.

Older cases have stated that a refusal of an employer to withhold FICA contributions may allow for a private right of action. See Sanchez v. Overmyer, 845 F.Supp. 1178 (N.D. Ohio 1993); Campbell v. Miller, 836 F.Supp. 827 (M.D. Fla. 1993); Ford v. Troyer, 25 F.Supp.2d 723 (E.D. La. 1998). However, there do not appear to be any cases agreeing with this conclusion since around 1998, and these are all district court opinions. While no higher court has come down with a ruling saying the district courts' rulings are in error, other district courts within the same circuit have held the opposite without challenge. *Compare* Salazar v. Brown, 940 F.Supp. 160 (W.D. Mich. 1996) (no express right of action exists for employees to sue their employer for declaratory or other type of relief); Glanville v. Dupar, Inc., 727 F.Supp.2d 596 (S.D. Tex. 2010) (holding that any cases cited in favor of a private right of action were unpersuasive because they were decided prior to any relevant appellate court decisions, and that if the Fifth Circuit were to decide such a case, it would likely follow its sister circuits.) Also, while not expressly overruling Campbell, decided within the Eleventh Circuit, McDonald v. Southern Farm Bureau Life Ins. Co., 291 F.3d 718 (11th Cir. 2002) was an appellate decision specifically holding that no private cause of action exists for a FICA claim.

Significantly, there are cases from at least eight circuits holding that there is no private right of action for a FICA claim. McDonald, (supra) is relied upon in many cases involving attempts at bringing private actions under FICA. The Third Circuit is the other appellate court to render a decision on private rights of action. In Umland v. PLANCO Financial Services, Inc., 542 F.3d 59 (3rd Cir. 2008), the court also held that FICA does not create a private right of action.

In Sanchez v. Overmyer, 845 F. Supp. 1178 (1993), an Ohio district court applied the

four-part test of Cort v. Ash, 422 U.S. 66 (1975), to find that an implied private right under FICA exists to require an employer to make its share of FICA contributions. The test is stated as follows:

> "First, is the plaintiff one of the class for whose especial benefit the statute was enacted, ...that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"

Sanchez, 845 F. Supp. at 1180-1181 (citing Cort, 422 U.S. at 78).

In applying the Cort test, the court found (1) that the plaintiffs, who were migrant farm workers, were members of the principal group that FICA was designed to protect: workers of the United States; (2) that allowing a plaintiff relief under FICA is consistent with the intent of FICA; (3) that allowing a private cause of action where an employee seeks to force his/her employer to record and make the appropriate FICA contributions is consistent with the purpose of FICA, which is to create a trust fund for retirement; and (4) that the establishment and maintenance of a national retirement and general welfare fund is not something traditionally relegated to state law. However, the Cort factors were "eroded" in Touche Ross & Co v. Reddington, 442 U.S. 560, which stated that the ultimate question "is one of legislative intent, not one of whether [the] Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross,* 442 U.S. at 578, 99 S.Ct. 2479.

Enforcement of the FICA tax obligations is entrusted to the IRS. Generally, employer returns are subject to examination and audit by the IRS with regard to compliance with FICA. If the IRS determines that the employer has underpaid FICA liability, the IRS will issue a tax assessment. Salazar, 940 F. Supp. at 163 (citing 26 U.S.C. §§6201, 6205, 6211). If the employer does not agree with the assessment, the employer must nevertheless pay the assessedFICA tax and then litigate the matter in a U.S. District Court or the Court of Claims. Id. (citing 28 U.S.C. §1346(a)).

Because the worker's entitlement to social security benefits is measured by the worker's actual receipt of covered wages, and not by the reporting of income or the payment of FICA taxes, the SSA creates an express administrative remedy for employees who contend that earnings have not been credited properly to their record for social security purposes. Salazar, 940 F. Supp. at 163. An employee seeking to establish that he/she has earned wages that should be credited to his/her account for social security purposes must proceed before the Secretary of Health and Human Services to correct his/her earnings record. Id. Thereafter, the agency will investigate the requested correction and make any necessary changes. Id. (citing 20 C.F.R. §§404.802-823). If the employee is still not satisfied, he/she may obtain judicial review in a federal district court. Id. (citing 42 U.S.C. §405(c)(8)). The employer is neither a necessary nor a proper party in these proceedings.

In addition to Salazar, other courts have held that there is no private cause of action under FICA. In McElwee v. Wharton, 19 F.Supp.2d 766 (1998), the plaintiff sought restitution from the defendants for employment taxes allegedly owed by the defendants, but paid by the plaintiff. The plaintiff had been paying taxes under the Self-Employment Contribution Act ("SECA"), which would have been paid by the defendants (i.e., plaintiff's employer) under FICA had the plaintiff been treated as an employee rather than an independent contractor. The court relied on the rationale of Salazar to conclude that an employee does not have an equitable right of restitution as to federal employment taxes.

Unlike the foregoing cases, which focus on whether a private cause of action is available under the SSA or the FICA, the Seventh Circuit addressed the issue in terms of whether a plaintiff has standing under either statute to force an employer to make contributions. Benefits under the SSA depend on the number of quarters in which a person earns income and the level of that income. Calderon v. Witvoet, 999 F.2d 1101, 1106 (7th Cir. 1993). Benefits do not, however, depend on whether the employer actually paid the taxes. Id. So the wage earner is entitled to Social Security credit for all sums earned and reported regardless of whether the employer satisfies its obligations under the FICA. Id. Therefore, in Calderon, the Seventh Circuit held that the plaintiffs, migrant farm workers, had standing to enforce the SSA's reporting requirements. Id. An employer's failure to report the wages of its employees constitutes an injury in fact for standing purposes because it deprives the employees of social security credit. However, the court also *impliedly* held that a plaintiff does *not* have standing under the FICA to compel an employer to withhold and make social security contributions. Id at 1105. According to the court, the plaintiffs had no interest in whether the employer pays its taxes. In fact, the court noted that collection and payment of the tax would have made the workers worse off. Id. Thus, the plaintiffs did not suffer an injury in fact via the employer's failure to make FICA contributions. Id at 1106.

C. Independent Contractor vs. Employee Test Under FICA and SSA

Despite the foregoing split in authority on the issue of whether a private cause of action exists under the SSA or the FICA, and assuming that a worker can sue his/her employer for its failure to make FICA contributions, a worker must be able to show that he/she is an "employee," and not an "independent contractor," to win.

For federal tax purposes, common law principles distinguish independent contractors from employees. Consolidated Flooring Services v. U.S., 38 Fed.Cl. 450, 454 (1997) (citing 26 U.S.C. §§ 3121 (d)(2), 3306(i) and 26 C.F.R. § 31.3121(d)-1). The common law of employer-employee refers to "the general common law of agency, rather than...the law of any particular state." Consolidated Flooring Services, 38 Fed.Cl. at 454 (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989)). Under the general common law of agency, a court is required to consider the hiring party's right to control the means and details of the work. Reid, 490 U.S. at 751-752. According to the IRS, facts that provide evidence of the degree of control and independence fall into three categories: behavioral control, financial control and the type of relationship between the parties. See Illinois Bar Journal, Vol. 89, pg. 149, March 2001. The following is a synopsis of the considerations relevant to each category.

1. BEHAVIORAL CONTROL:

   A. *Instructions the business gives the worker*: when and where to do the work; what tools or equipment to use; what assistants to hire; where to purchase supplies and services; what work must be performed by a specified individual; what order or sequence to follow.

   B. *Training the business gives the worker*: an employee may be trained to perform services in a particular manner, whereas as independent contractor is more likely to use his/her own methods.

2. FINANCIAL CONTROL:

   A. *The extent to which the worker has unreimbursed business expenses*: employees are more likely to get reimbursed.

   B. *The extent of the worker's investment in the facilities he/she uses to perform services for someone else:* an independent contractor is more likely to have a personal investment in his/her tools of the trade.

   C. *The extent to which the worker makes services available to the relevant market*: an independent contractor often advertises or seeks out his/her own business opportunities.

   D. *How the business pays the worker*: employee is often paid hourly, salary or over the course of a period of time, whereas an independent contractor usually gets a flat fee per project.

   E. *The extent to which the worker can realize a profit or loss*: an independent contractor can make a profit or loss, an employee cannot.

3. TYPE OF RELATIONSHIP:

   A. *Whether the parties have a written contract describing the relationship they intended to create.*

   B. *Whether the business provides the worker with employee-type benefits.*

   C. *The permanency of the relationship.* If you engage a worker with the expectation that the relationship will continue indefinitely,

rather than for a specific period or project, this is considered as evidence of an intent to create and ER-EE relationship.

D. *The extent to which the services performed by the worker are a key aspect of the regular business of the company.* If so, then the worker is more likely to be an employee.

The IRS website now contains a section that specifically addresses this issue. http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Independent-Contractor-%28Self-Employed%29-or-Employee%3F. The site discusses the common law rules as well, noting that the key is to "look at the entire relationship, consider the degree or extent of the right to direct and control, and finally, to document each of the factors used in coming up with the determination." Id. The site also says that if, after reviewing the three categories, it is still unclear as to whether a worker is an employee or independent contractor, a Form SS-8 can be filed with the IRS. The form can be submitted by either the worker or the employer. Id. See also Umland v. PLANCO Financial Services Inc., 542 F.3d 59 (3rd Cir., 2008) (holding no private right of action and discussing whether a worker was independent contractor or employee and the IRS procedure).

II. WORKERS' COMPENSATION

A. Background

An employer under the Workers' Compensation Act must carry workers' compensation insurance and post a notice in the workplace that lists the insurance carrier and explains workers' rights under the law. Under the Act, an employer can either purchase workers' compensation insurance from a private insurance company or it can insure itself for its workers' compensation liabilities. See 820 ILCS 305/4.[2] An employer must be engaged in one of the businesses or enterprises listed under Section 3 of the Act to be automatically subject to the requirements of the Act. If the employer is not engaged in any of the businesses or enterprises listed under Section 3 of the Act, it may voluntarily elect to be subject to the requirements of the Act. An "employer" is defined, in pertinent part, as follows:

> "Every person, firm, public or private corporation...who has any person in service or under any contract for hire, express or implied, oral or written, and who is engaged in any of the enterprises or businesses enumerated in Section 3 of this Act, or who at or prior to the time of the [employee's] accident...has...elected to become subject to the ...Act..."

See 820 ILCS 305/1(a)(2).

Section 3 of the Act lists several enterprises or businesses which are considered to be extra hazardous. As stated earlier, if an employer is engaged in any of the enterprises or businesses listed under Section 3, it is automatically subject to the Act.

B. Issue: *Whether a qui tam action can be maintained to compel an employer to*

procure workers' compensation insurance for its employees.

The Workers' Compensation Act does not authorize qui tam actions against an employer for its failure to procure workers' compensation insurance for its employees. In addition, there are no cases under the Act granting a plaintiff a private right of action against his/her employer for its failure to obtain workers' compensation insurance. At most, there is one case in which the Illinois Supreme Court found an implied private right of action under the Act for an employee who was discharged in retaliation for filing a workers' compensation claim. See Kelsay v. Motorola, Inc., 384 N.E.2d 353 (1979). However, the Court has also held that there is no cause of action for discrimination or demotion of an employee for filing a workers' compensation claim. See Zimmerman v. Buchheit of Sparta, Inc., 164 Ill.2d 29 (1994).

Despite the fact that neither a qui tam action nor a private cause of action is authorized under the Act, there is an administrative mechanism available for enforcing an employer's obligation to procure workers' compensation insurance. Employers suspected of not complying with the Act by failing to obtain workers' compensation insurance can be reported to the Insurance Compliance Division ("ICD") of the Industrial Commission. After the name of the employer is disclosed, the ICD will conduct an investigation to see if the employer is in compliance with the Act. If the employer is found to be in non-compliance with the Act, the employer will be fined a minimum of $500 but not more than $2,500. 820 ILCS 305/4(d). The employer must pay the fine and submit proof to the Commission that it has obtained the required insurance within 10 days of receiving the citation. Id. If an employer argues that it was fined in error, and that it did have the requisite insurance, the employer is entitled to a hearing. The employer also has 30 days to show that the notice of noncompliance was issued in error. If, after the hearing, Commission finds that the employer in fact did not have the requisite insurance, the employer will be fined a minimum of $10,000. See 820 ILCS 305/4(d). The ICD can be reached at (312) 814-6611. More information can be found at www.iwcc.il.gov/insurance.

C. Independent Contractor vs. Employee Test Under the Workers' Compensation Act

Assuming that the employer is engaged in a Section 3 business or enterprise, there must also be an employer-employee relationship at the time of an employee's accident for the employee to secure the benefits and protections of the Act. Alexander v. Industrial Commission, 381 N.E.2d 669, 670 (1978). The Act defines "employee," in pertinent part, as "[e]very person in the service of another under any contract of hire, express or implied, oral or written..." See 820 ILCS 305/1(b)(2). As the court in Tooley v. Industrial Commission, 603 N.E.2d 145, 146 (1992), stated:

> "The relationship of employer and employee is a contractual relationship, the requisites to the formation of which are determined by an application of the principles governing the formation of other contracts. The relationship is a product of a meeting of minds expressed by some offer on the part of one to employ or to work for the other and an acceptance on the part of the other."

Although the definition of employee is to be broadly construed (Acme Window Cleaning

Co. v. Industrial Commission, 186 N.E. 482 (1929)), it has long been held that independent contractors are excluded from the protections of the Act. Alexander, 381 N.E.2d at 670. Determining whether an individual is an employee or an independent contractor for purposes of the Workers' Compensation Act can be difficult. Since many jobs contain elements of each, there is no clear line of demarcation between the status of employee and independent contractor. Kirkwood v. Industrial Commission, 416 N.E.2d 1078, 1080 (1981). The Industrial Commission or a court will consider many factors to distinguish between an employee and an independent contractor. The most frequently considered factors include, but are not limited to, the amount of supervision and control, the method of making payment, the right to discharge, the skills required, the source of materials and tools, and the work schedule. Id. at 1080-1081. The most important of the foregoing factors is the right to control the worker and the details of his work.[4] Id. If the facts allow inferences to be made either way, that the person is an independent contractor or is an employee, then the Commission alone is empowered to make the call, and the decision will not be set aside unless against the manifest weight of the evidence. Id.; see also Kirkwood v. Industrial Com., 84 Ill.2d 14 (1981).

III. UNEMPLOYMENT INSURANCE

A. Background

The Unemployment Insurance Act provides economic relief to those who are involuntarily unemployed through the collection of compulsory contributions from employers and the payment of benefits to eligible unemployed persons. 820 ILCS 405/100 *et seq.* Unlike the FICA, the Unemployment Insurance Act is not a taxing statute. Jack Bradley, Inc. v. Dept. of Employment Security, 585 N.E.2d 123 (1991). Rather, an employer is required to make unemployment contributions to a fund with respect to wages payable for employment. See 820 ILCS 405/1400; National Data Services of Chicago, Inc., v. Director of Employment Security, 746 N.E.2d 40, 44 (2001). The rate of contribution is unique to each employer and based on a very complex set of standards set forth in the Act. Generally, the Illinois Dept. of Employment Security ("IDES") considers three factors in calculating an employer's annual contribution rate. First, rates are based on the total amount of unemployment benefits paid to an employer's former employees. Second, the IDES considers an employer's total taxable wages for the year. Lastly, the IDES considers the total amount of unemployment benefits paid by Illinois employers for the previous year. See www.ides.illinois.gov. The website has a table of employer contribution rates from 2007 to 2013. It says for employers with other three years of experience, the contribution rate is based on a ratio which is determined in such a way that the greater the unemployment caused by the employer, the higher the rate.

B. Issue: *Whether a qui tam action can be maintained to compel an employer to procure workers' compensation insurance for its employees.*

The Unemployment Insurance Act does not authorize qui tam actions against an employer for its failure to pay into an unemployment insurance fund for its employees. In addition, there are no cases under the Act granting a plaintiff a private right of action against his/her employer for its failure to make unemployment insurance contributions. At most, and similar to Kelsay v. Motorola, Inc. (supra), there is one case in which an Illinois Appellate Court

found an implied private right of action under the Act for an employee who was discharged in retaliation for filing a claim for unemployment insurance. See Fiumetto v. Garrett Enterprises, Inc., 749 N.E.2d 992 (2001) (Plaintiff was a dance instructor whose hours were reduced. She informed the employer that she planned to file for unemployment and was subsequently terminated). However, at least one Illinois court has declined to extend the implied private right of action to a whistleblower who alleges retaliatory discharge. Handel v. Belvedere USA Corp., 2001 WL 1286842 at 5. Despite the fact that neither a qui tam action nor a private cause of action is authorized under the Act, there are administrative mechanisms available for enforcing an employer's obligation to pay into the unemployment insurance fund.

The Act authorizes the Director of the Department of Employment Security ("Director")to determine and assess contributions and/or delinquencies by employers through an audit conducted after an employer suspected of not making contributions to the unemployment fund is reported to the IDES. Section 2200 of the Act states, in pertinent part, as follows:

> "If it shall appear to the Director that any employment unit...has failed to pay any contribution, interest or penalty...when required by the provisions of this Act..., the Director may......determine and assess the amount of such contributions or deficiency, as the case may be, together with interest and penalties due and unpaid, and immediately serve notice upon such employing unit...of such determination and assessment and make a demand for payment of the assessed contribution together with interest and penalties thereon...Such determination and assessment by the Director shall be final at the expiration of 20 days from the date of the service of such written notice thereof and demand for payment, unless such employing unit or person shall have filed with the Director a written protest and a petition for a hearing...Upon the receipt of such petition within the 20 days allowed, the Director shall fix the time and place for a hearing and shall notify the petitioner thereof...At any hearing..., the determination and assessment that has been made by the Director shall be prima facie correct and the burden shall be upon the protesting employing unit...to prove that it is incorrect."

820 ILCS 405/2200.

Individuals may report suspected employer violations either by phone or by written complaint. To submit a complaint by phone, the individual should call the IDES Fraud Reporting department at (877)-566-6230. The IDES will take down the individual's name, contact information, social security number and address. The IDES will not disclose the individual's identity but complaints cannot be made anonymously. To submit a complaint by mail, the individual should send a written complaint disclosing his or her identity and contact information, the employer name and a description of the issue. Complaints should be mailed to:

Illinois Department of Employment Security
ATTN: Benefit Payment Control
33 S. State Street, 10th Floor
Chicago, IL 60603

Upon receipt of the complaint, an IDES field auditor will research the matter further and conduct an audit of the employer's books and records. If the audit does in fact disclose deficiencies in unemployment fund contributions, the IDES will send the employer a claim letter. Thereafter, the employer is given a chance to rebut the IDES' findings. If the matter is not resolved at that level, any disputes are disposed of in a hearing at which the IDES acts as prosecutor under the Unemployment Insurance Act.

The Act also provides for judicial review of decisions on contributions. See 820 ILCS 405/2205. As stated in the Act: "[t]he Circuit Court of the county wherein the hearing provided for in Section 2200...was held shall have power to review the final administrative decisions of the Director rendered pursuant to [that] Section." Id.; see, e.g., E & E Truck Line, Inc. v. Dept. of Employment Security, 634 N.E.2d 1191 (1994).

C. Independent Contractor vs. Employee Test Under the Unemployment Insurance Act

Liability for contributions and eligibility for benefits is dependent, in part, on the existence of an "employment" relationship. The determination of whether such a relationship exists is not controlled by the common law principles of master and servant and independent contractor (as with the Social Security Act). Rather, the terms of the statute control. AFM Messenger Service, Inc. v. Dept. of Employment Security, 198 Ill.2d 380 (2002). Thus, a person who is regarded at common law as an independent contractor may nonetheless be considered an employee under the Act. Id.

The Act defines "employment" as "any service...performed by an individual for an employing unit." 820 ILCS 405/206. "Employing unit" is defined as "any individual or type of organization...which has...had in its employ one or more individuals performing services for it within this State." 820 ILCS 405/204. Section 212 of the Act provides an exception to the contribution requirement for services performed by independent contractors. 820 ILCS 405/212; National Data Services of Chicago, Inc., 746 N.E.2d at 45. Section 212 states, in pertinent part, as follows:

> "Service performed by an individual for an employing unit...shall be deemed to be employment unless and until it is proven in any proceeding where such issue is involved that–
>
> A. Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; *and*
>
> B. Such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; *and*
>
> C. Such individual is engaged in an independently established trade, occupation, profession, or business." 820 ILCS 405/212.

IV. ILLINOIS EMPLOYEE CLASSIFICATION ACT

A. Overview of the Act

The Illinois Employee Classification Act, 820 ILCS 185 *et seq.*, was enacted in January 2008 to address the problem in the construction industry of employers purposefully misclassifying workers as independent contractors to avoid paying taxes under FICA, worker's compensation or unemployment. 820 ILCS 185/25. See also Bartlow v. Costigan, 974 N.E.2d 937 (2012). The Act contains a long list of the kinds of business entities covered at 820 ILCS 185/10. Any covered employer must report all payments made to non-employee workers. Id. at 185/42(a). The report must be submitted to the Department annually. Id. The Act grants the Illinois Department of Labor the power to conduct investigations in connection with its administration and enforcement. Bartlow, 947 N.E.2d 937,944. See also 820 ILCS 185/25.

A business entity covered by the Act must post notice for all non-employee individuals who perform services for it in a conspicuous place in English, Spanish and Polish. Id. at 185/15. A sample of the notice can be found at:

http://www.illinois.gov/idol/Laws-Rules/CONMED/Pages/employee-classification-act.aspx

Any interested party may file a complaint with the Department against an employer. The Department itself may also file a complaint. Id. at 185/25. The Department will then review the complaint to determine if there is need for an investigation. 56 Ill. Adm. Code 240.220(a) (2008).

The Department may investigate using "any method or combination of methods deemed suitable at the direction of the Department." 56 Ill. Adm. Code 240.300. The investigation must include a written notice to the employer of the substance of the complaint and an opportunity to present any information it wishes the Department to consider in reaching its determination. 56 Ill. Adm. Code 240.300. If an employer refuses to cooperate with an investigation, the Department may make a finding that the Act has been violated based upon the evidence available. 56 Ill. Adm. Code 240.300(a). Before making a final determination, the Department must notify the employer of the substance of the investigation and afford the employer an opportunity to present any written information to the Department. The employer must do this within 30 days of the notice. 56 Ill. Adm. Code 240.300(d). As part of the investigation, the Department may convene a fact-finding conference in person or by telephone. All parties must be given notice of the conference at least 15 days prior to the conference, and each party may be accompanied by an attorney. 56 Ill. Adm. Code 240.310(a),(b).

The Act also gives the Department a list of enforcement remedies it may seek once it determines that there has been a violation. Section 25(b) of the Act provides as follows:

> "Whenever the Department believes upon investigation that there has been a violation of any of the provisions of this Act or any rules or regulations promulgated under this

> Act, the Department may: (i) issue and cause to be served on any party an order to cease and desist from further violation of the Act, (ii) take affirmative or other action as deemed reasonable to eliminate the effect of the violation, (iii) collect the amount of any wages, salary, employment benefits, or other compensation denied or lost to the individual, and (iv) assess any civil penalty allowed by this Act. The civil penalties assessed by the Department as well as any other relief requested by the Department shall be recoverable in an action brought in the name of the people of the State of Illinois by the Attorney General." 820 ILCS 185/25(b).

The employer has 28 calendar days from the date of the Department's findings to answer the allegations. 820 ILCS 185/25(c). An employer who is found to have violated the Act shall receive a civil penalty not to exceed $1,000 for each violation found in the first audit. Id. at 185/40(a). The employer will be subject to a civil penalty not to exceed $2,000 for each repeat violation within a five year period. Id. If the employer fails to comply with the specified remedies within 30 calendar days, the Department may refer the matter to the Attorney General within 180 days. 56 Ill. Adm.Code 240.500(d) (2008). If an employer is found to have willfully violated the Act, it is liable for penalties up to double the statutory amount, and may be liable to the employee for punitive damages in an amount equal to the penalties assessed. 820 ILCS 185/45. If the employer commits a second violation within five years of the first violation, the Department will place the employer on a debarment list posted on its official website at:

http://www.illinois.gov/idol/Laws-Rules/CONMED/Pages/Prohibited-Contractors.aspx

The Department must also notify the employer. No state contract may be awarded to an employer appearing on the list until four years have passed from the date of the last violation. 820 ILCS 185/42. The Act also contains an anti-retaliation section. Id. at 185/50.

The Act allows for a private right of action. 820 ILCS 185/60. An interested party or person may file a suit in circuit court without regard to exhaustion of any alternative administrative remedies provided in the Act. Id. Actions may be brought by one or more persons on behalf of themselves and other persons "similarly situated." Id. Such person is entitled to collect the amount of any wages, salary, employment benefits or other compensation denied or lost by reason of the violation, plus an equal amount in liquidated damages, compensatory damages up to $500, and in the case of retaliation, all legal or equitable relief that is appropriate. Id. The section contains a limitations period of three years from the final date of performing services to the employer. Id. at 185/60(b).

Furthermore, the Act allows for any officer or agent who knowingly permits an employer to violate the Act to be held individually liable for all violations and penalties assessed. 820 ILCS 185/63.

B. Case Authority

The Employee Classification Act has only been adjudicated in two cases thus far. In Bartlow v. Shannon, 927 N.E.2d 88 (2010) the Department initiated an investigation against the plaintiffs, who were a husband and wife company. After an investigation and interviews, the

Department sent the plaintiffs a notice of determination that it found they had failed to properly classify ten workers as employees. The Department requested information that was only available from the plaintiffs' subcontractors. Plaintiffs brought suit seeking a declaratory judgment that the Act violated the Illinois and US Constitution. Plaintiffs also sought a TRO and a preliminary injunction against the Department from enforcing the act during the litigation. The Court found that a declaratory judgment proceeding was proper. The Court also found that Plaintiffs were entitled to the TRO and remanded the case for a hearing on the preliminary injunction. The Court raised concerns that the Act does not appear to provide an accused with a meaningful hearing prior to the Department finding a violation, and allows for assessment of penalties against an accused without basic due process protections. Id. at 100.

On remand to the circuit court, Plaintiffs did not request a hearing for their preliminary injunction and both parties filed motions for summary judgment. Bartlow v. Costigan, 974 N.E.2d 937 (Il. App. 5th Dist., 2012). The circuit court entered a memorandum finding that the Act did not violate due process, equal protection or the prohibitions against special legislation or bills of attainder. Id. at 943.

The Department argued that its power to assess fines under the Act was merely a power to ask the contractor to settle out of court. Id. at 949. Its assessments of fines "can be ignored by the contractor with no consequences." Id. Once the Department brings an action in circuit court and the circuit court finds that a violation has occurred, the court will decide whether any fines or sanctions should be assessed. Id.

The Court stated that the Department's interpretation of the Act "clearly" met due process requirements because a contractor accused of violating the Act is afforded all of the due process protections contained in the Code of Civil Procedure and the Code of Criminal Procedure before he or she can be deprived of life, liberty or property. Thus, it affirmed the circuit court's decision that the Act was not facially unconstitutional.

In World Painting Co., 967 N.E.2d 485 (2012) the trial court enjoined the Department from enforcing the Act against the plaintiffs based on this court's decision in Bartlow v. Shannon, 399 Ill. App. 3d 560, 927 N.E.2d 88 (2010). In that case, the Department entered into an agreement with the plaintiff that, under the Act, it could only conduct a no-consequences investigation. The court reversed the trial court's injunction because the parties agreed to a plan for conducting their interaction as the Department investigated the possible violations, and the Department was forbidden from making any adjudicatory findings of plaintiffs' liability. Therefore, the court concluded, due process was not implicated by the investigation.