

S05847 Summary:

BILL NO S05847F

SAME AS Same as A 8237-D

SPONSOR ONORATO

COSPNSR FOLEY, ADDABBO, BRESLIN, KRUEGER, LARKIN, SAVINO, SCHNEIDERMAN,
STACHOWSKI, ADDABBO

MLTSPNSR

Add Art 25-B SS861 - 861-f, amd S511, Lab L; amd S2, Work Comp L

Enacts the "New York state construction industry fair play act"; defines terms; provides notice to persons receiving remuneration from contractors and subcontractors; describes violations; authorizes enforcement and penalties.

S05847 Text:

S T A T E O F N E W Y O R K

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Cal. No. 782

2009-2010 Regular Sessions

I N S E N A T E

June 11, 2009

Introduced by: Sens. ONORATO, FOLEY, ADDABBO, BRESLIN, KRUEGER, LARKIN, SAVINO, SCHNEIDERMAN, STACHOWSKI -- read twice and ordered printed, and when printed to be committed to the Committee on Rules -- recommitted to the Committee on Labor in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported favorably from said committee and committed to the Committee on Codes -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported favorably from said committee and committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- reported favorably from said committee, ordered to first and second report, ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading -- again amended and ordered reprinted, retaining its place in the order of third reading -- again amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the labor law, in relation to enacting the "New York State construction industry fair play act"; and to amend the workers' compensation law, in relation to the definition of employee

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEM-

BLY, DO ENACT AS FOLLOWS:

1 Section 1. The labor law is amended by adding a new article 25-B to
2 read as follows:

3 ARTICLE 25-B

4 THE NEW YORK STATE CONSTRUCTION INDUSTRY FAIR PLAY ACT

5 SECTION 861. SHORT TITLE.

6 861-A. LEGISLATIVE FINDINGS AND INTENT.

7 861-B. DEFINITIONS.

8 861-C. PRESUMPTION OF EMPLOYMENT IN THE CONSTRUCTION INDUSTRY.

EXPLANATION--Matter in *ITALICS* (underscored) is new; matter in brackets
[] is old law to be omitted.

LBD11756-24-0

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1 861-D. NOTICE TO PERSONS RECEIVING REMUNERATION FROM CONTRACTORS
2 AND SUBCONTRACTORS.

3 861-E. VIOLATIONS AND PENALTIES.

4 861-F. RETALIATION.

5 S 861. SHORT TITLE. THIS ARTICLE SHALL BE KNOWN AND MAY BE CITED AS
6 "THE NEW YORK STATE CONSTRUCTION INDUSTRY FAIR PLAY ACT".

7 S 861-A. LEGISLATIVE FINDINGS AND INTENT. THE LEGISLATURE HEREBY FINDS
8 AND DECLARES THAT NEW YORK STATE'S CONSTRUCTION INDUSTRY IS EXPERIENCING
9 DANGEROUS LEVELS OF EMPLOYEE MISCLASSIFICATION FRAUD. UNSCRUPULOUS
10 EMPLOYERS ARE INTENTIONALLY REPORTING EMPLOYEES AS INDEPENDENT CONTRAC-
11 TORS TO STATE AND FEDERAL AUTHORITIES OR WORKERS' COMPENSATION CARRIERS
12 IN RECORD NUMBERS. IN ADDITION, THERE HAS BEEN AN EXPLOSION OF EMPLOYERS
13 WHO OPERATE IN THE UNDERGROUND ECONOMY AND FAIL TO REPORT ALL OR A SIZA-
14 BLE PORTION OF THEIR WORKERS.

15 THE LEGISLATURE HEREBY FINDS AND DECLARES THAT RECENT STUDIES OF NEW
16 YORK CITY'S CONSTRUCTION INDUSTRY ALONE SUGGESTS THAT AS MANY AS FIFTY
17 THOUSAND NEW YORK CITY CONSTRUCTION WORKERS -- NEARLY ONE IN FOUR -- ARE
18 EITHER MISCLASSIFIED AS INDEPENDENT CONTRACTORS OR ARE EMPLOYED BY
19 CONSTRUCTION CONTRACTORS COMPLETELY OFF THE BOOKS. CONSTRUCTION INDUSTRY
20 FRAUD REDUCES GOVERNMENT REVENUE, SHIFTS TAX AND WORKERS' COMPENSATION
21 INSURANCE COSTS TO LAW-ABIDING EMPLOYEES, LOWERS WORKING CONDITIONS AND
22 STEALS JOBS FROM LEGITIMATE EMPLOYERS AND THEIR EMPLOYEES.

23 THEREFORE, THE LEGISLATURE HEREBY FINDS AND DECLARES THAT GOVERNMENT
24 HAS AN OBLIGATION TO CURB THIS UNDERGROUND ECONOMY, ENFORCE LONG-STAND-
25 ING EMPLOYMENT LAWS, ENSURE COMPLIANCE WITH ESSENTIAL SOCIAL INSURANCE
26 PROTECTIONS AND ELIMINATE THE UNFAIR COMPETITIVE ADVANTAGE FROM CONTRAC-
27 TORS IN THE UNDERGROUND ECONOMY BY AND THROUGH THE ENACTMENT OF THE NEW
28 YORK STATE CONSTRUCTION INDUSTRY FAIR PLAY ACT.

29 S 861-B. DEFINITIONS. AS USED IN THIS ARTICLE:

30 1. "CONSTRUCTION" MEANS CONSTRUCTING, RECONSTRUCTING, ALTERING, MAIN-
31 TAINING, MOVING, REHABILITATING, REPAIRING, RENOVATING OR DEMOLITION OF
32 ANY BUILDING, STRUCTURE, OR IMPROVEMENT, OR RELATING TO THE EXCAVATION
33 OF OR OTHER DEVELOPMENT OR IMPROVEMENT TO LAND.

34 2. "CONTRACTOR" MEANS ANY SOLE PROPRIETOR, PARTNERSHIP, FIRM, CORPO-
35 RATION, LIMITED LIABILITY COMPANY, ASSOCIATION OR OTHER LEGAL ENTITY
36 PERMITTED BY LAW TO DO BUSINESS WITHIN THE STATE WHO ENGAGES IN
37 CONSTRUCTION AS DEFINED IN THIS ARTICLE.

38 3. "CONTRACTOR" INCLUDES A GENERAL CONTRACTOR AND A SUBCONTRACTOR.

39 4. "DEPARTMENT" MEANS THE DEPARTMENT OF LABOR.

40 5. "COMMISSIONER" MEANS THE COMMISSIONER OF LABOR.

41 6. "EMPLOYER" MEANS ANY CONTRACTOR THAT EMPLOYS INDIVIDUALS DEEMED
42 EMPLOYEES UNDER THIS ARTICLE.

43 S 861-C. PRESUMPTION OF EMPLOYMENT IN THE CONSTRUCTION INDUSTRY. 1.

44 ANY PERSON PERFORMING SERVICES FOR A CONTRACTOR SHALL BE CLASSIFIED AS
45 AN EMPLOYEE UNLESS THE PERSON IS A SEPARATE BUSINESS ENTITY UNDER SUBDI-
46 VISION TWO OF THIS SECTION OR ALL OF THE FOLLOWING CRITERIA ARE MET, IN
47 WHICH CASE THE PERSON SHALL BE AN INDEPENDENT CONTRACTOR:

48 (A) THE INDIVIDUAL IS FREE FROM CONTROL AND DIRECTION IN PERFORMING
49 THE JOB, BOTH UNDER HIS OR HER CONTRACT AND IN FACT;

50 (B) THE SERVICE MUST BE PERFORMED OUTSIDE THE USUAL COURSE OF BUSINESS
51 FOR WHICH THE SERVICE IS PERFORMED; AND

52 (C) THE INDIVIDUAL IS CUSTOMARILY ENGAGED IN AN INDEPENDENTLY ESTAB-
53 LISHED TRADE, OCCUPATION, PROFESSION, OR BUSINESS THAT IS SIMILAR TO THE
54 SERVICE AT ISSUE.

55 2. A BUSINESS ENTITY, INCLUDING ANY SOLE PROPRIETOR, PARTNERSHIP,
56 CORPORATION OR ENTITY THAT MAY BE A CONTRACTOR UNDER THIS SECTION SHALL
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1 BE CONSIDERED A SEPARATE BUSINESS ENTITY FROM THE CONTRACTOR WHERE ALL
2 THE FOLLOWING CRITERIA ARE MET:

3 (A) THE BUSINESS ENTITY IS PERFORMING THE SERVICE FREE FROM THE DIREC-
4 TION OR CONTROL OVER THE MEANS AND MANNER OF PROVIDING THE SERVICE,
5 SUBJECT ONLY TO THE RIGHT OF THE CONTRACTOR FOR WHOM THE SERVICE IS
6 PROVIDED TO SPECIFY THE DESIRED RESULT;

7 (B) THE BUSINESS ENTITY IS NOT SUBJECT TO CANCELLATION OR DESTRUCTION
8 UPON SEVERANCE OF THE RELATIONSHIP WITH THE CONTRACTOR;

9 (C) THE BUSINESS ENTITY HAS A SUBSTANTIAL INVESTMENT OF CAPITAL IN THE
10 BUSINESS ENTITY BEYOND ORDINARY TOOLS AND EQUIPMENT AND A PERSONAL VEHI-
11 CLE;

12 (D) THE BUSINESS ENTITY OWNS THE CAPITAL GOODS AND GAINS THE PROFITS
13 AND BEARS THE LOSSES OF THE BUSINESS ENTITY;

14 (E) THE BUSINESS ENTITY MAKES ITS SERVICES AVAILABLE TO THE GENERAL
15 PUBLIC OR THE BUSINESS COMMUNITY ON A CONTINUING BASIS;

16 (F) THE BUSINESS ENTITY INCLUDES SERVICES RENDERED ON A FEDERAL INCOME
17 TAX SCHEDULE AS AN INDEPENDENT BUSINESS OR PROFESSION;

18 (G) THE BUSINESS ENTITY PERFORMS SERVICES FOR THE CONTRACTOR UNDER THE
19 BUSINESS ENTITY'S NAME;

20 (H) WHEN THE SERVICES BEING PROVIDED REQUIRE A LICENSE OR PERMIT, THE
21 BUSINESS ENTITY OBTAINS AND PAYS FOR THE LICENSE OR PERMIT IN THE BUSI-
22 NESS ENTITY'S NAME;

23 (I) THE BUSINESS ENTITY FURNISHES THE TOOLS AND EQUIPMENT NECESSARY TO
24 PROVIDE THE SERVICE;

25 (J) IF NECESSARY, THE BUSINESS ENTITY HIRES ITS OWN EMPLOYEES WITHOUT
26 CONTRACTOR APPROVAL, PAYS THE EMPLOYEES WITHOUT REIMBURSEMENT FROM THE
27 CONTRACTOR AND REPORTS THE EMPLOYEES' INCOME TO THE INTERNAL REVENUE
28 SERVICE;

29 (K) THE CONTRACTOR DOES NOT REPRESENT THE BUSINESS ENTITY AS AN
30 EMPLOYEE OF THE CONTRACTOR TO ITS CUSTOMERS; AND

31 (L) THE BUSINESS ENTITY HAS THE RIGHT TO PERFORM SIMILAR SERVICES FOR
32 OTHERS ON WHATEVER BASIS AND WHENEVER IT CHOOSES.

33 3. THE FAILURE TO WITHHOLD FEDERAL OR STATE INCOME TAXES OR TO PAY
34 UNEMPLOYMENT COMPENSATION CONTRIBUTIONS OR WORKERS' COMPENSATION PREMI-
35 UMS WITH RESPECT TO AN INDIVIDUAL'S WAGES SHALL NOT BE CONSIDERED IN
36 MAKING A DETERMINATION UNDER THIS SECTION, EXCEPT AS SET FORTH IN PARA-
37 GRAPH (F) OF SUBDIVISION TWO OF THIS SECTION.

38 4. AN INDIVIDUAL'S ACT OF SECURING WORKERS' COMPENSATION INSURANCE
39 WITH A CARRIER AS A SOLE PROPRIETOR, PARTNERSHIP OR OTHERWISE SHALL NOT
40 BE BINDING ON ANY DETERMINATION UNDER THIS SECTION.

41 5. WHEN A BUSINESS ENTITY MEETS THE DEFINITION OF A SEPARATE BUSINESS
42 ENTITY PURSUANT TO SUBDIVISION TWO OF THIS SECTION, THE SEPARATE BUSI-
43 NESS ENTITY WILL BE CONSIDERED A CONTRACTOR SUBJECT TO ALL THE
44 PROVISIONS OF THIS ARTICLE IN REGARD TO THE CLASSIFICATION OF INDIVID-

45 UALS PERFORMING SERVICES FOR IT.

46 S 861-D. NOTICE TO PERSONS RECEIVING REMUNERATION FROM CONTRACTORS AND
47 SUBCONTRACTORS. 1. EVERY CONTRACTOR SHALL POST IN A PROMINENT AND ACCE-
48 SIBLE PLACE ON THE SITE WHERE THE CONSTRUCTION IS PERFORMED A LEGIBLE
49 STATEMENT, PROVIDED BY THE COMMISSIONER, THAT DESCRIBES THE RESPONSIBIL-
50 ITY OF INDEPENDENT CONTRACTORS TO PAY TAXES REQUIRED BY STATE AND FEDER-
51 AL LAW, THE RIGHTS OF EMPLOYEES TO WORKERS' COMPENSATION, UNEMPLOYMENT
52 BENEFITS, MINIMUM WAGE, OVERTIME AND OTHER FEDERAL AND STATE WORKPLACE
53 PROTECTIONS, AND THE PROTECTIONS AGAINST RETALIATION AND THE PENALTIES
54 IN THIS ARTICLE IF THE CONTRACTOR FAILS TO PROPERLY CLASSIFY AN INDIVID-
55 UAL AS AN EMPLOYEE. THIS NOTICE SHALL ALSO CONTAIN CONTACT INFORMATION
56 FOR INDIVIDUALS TO FILE COMPLAINTS OR INQUIRE WITH THE COMMISSIONER
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1 ABOUT EMPLOYMENT CLASSIFICATION STATUS. THIS INFORMATION SHALL BE
2 PROVIDED IN ENGLISH, SPANISH OR OTHER LANGUAGES REQUIRED BY THE COMMIS-
3 SIONER. THE POSTED STATEMENT SHALL BE CONSTRUCTED OF MATERIALS CAPABLE
4 OF WITHSTANDING ADVERSE WEATHER CONDITIONS.

5 2. WITHIN THIRTY DAYS OF THE EFFECTIVE DATE OF THIS ARTICLE, THE
6 COMMISSIONER SHALL CREATE THE NOTICE DESCRIBED IN SUBDIVISION ONE OF
7 THIS SECTION AND POST THE NOTICE ON THE DEPARTMENT'S WEBSITE FOR DOWN-
8 LOADING BY CONTRACTORS.

9 3. CONTRACTORS WHO VIOLATE THIS SECTION SHALL BE SUBJECT TO A CIVIL
10 PENALTY OF UP TO ONE THOUSAND FIVE HUNDRED DOLLARS FOR A FIRST
11 VIOLATION, AND UP TO FIVE THOUSAND DOLLARS FOR A SUBSEQUENT VIOLATION
12 WITHIN A FIVE YEAR PERIOD.

13 S 861-E. VIOLATIONS AND PENALTIES. 1. ANY CONTRACTOR WHO WILFULLY
14 FAILS TO PROPERLY CLASSIFY AN INDIVIDUAL AS AN EMPLOYEE AS PROVIDED
15 UNDER SECTION EIGHT HUNDRED SIXTY-ONE-C OF THIS ARTICLE SHALL BE SUBJECT
16 TO THE CIVIL AND CRIMINAL PENALTIES PROVIDED UNDER THIS SECTION. THE
17 CIVIL PENALTIES SET FORTH IN THIS SECTION SHALL BE IMPOSED AS FOLLOWS:
18 BY THE COMMISSIONER WHERE SUCH PENALTY IS BASED ON A VIOLATION OF THIS
19 CHAPTER; BY THE CHAIR OF THE WORKERS' COMPENSATION BOARD WHERE SUCH
20 PENALTY IS BASED ON A VIOLATION OF THE WORKERS' COMPENSATION LAW; AND BY
21 THE COMMISSIONER OF TAX AND FINANCE WHEN SUCH PENALTY IS BASED ON A
22 VIOLATION OF THE TAX LAW, PROVIDED THAT NO MORE THAN ONE CIVIL PENALTY
23 UNDER THIS SECTION MAY BE IMPOSED PER EMPLOYEE PER INCIDENT OF MISCLAS-
24 SIFICATION.

25 (A) THE WORKERS' COMPENSATION BOARD SHALL PROVIDE A COPY OF ANY ORDER
26 RELATING TO THE MISCLASSIFICATION OF AN EMPLOYEE, THE INTENTIONAL AND
27 MATERIAL UNDERPAYMENT OR CONCEALMENT OF PAYROLL, OR THE FAILURE TO
28 SECURE WORKERS' COMPENSATION IN THE CONSTRUCTION INDUSTRY TO THE COMMIS-
29 SIONER AND COMMISSIONER OF TAXATION AND FINANCE NO LATER THAN SEVEN DAYS
30 AFTER THE ISSUANCE OF THE ORDER.

31 (B) NOTWITHSTANDING THE SECRECY PROVISIONS CONTAINED IN ARTICLES
32 NINE-A AND TWENTY-TWO OF THE TAX LAW, THE DEPARTMENT OF TAXATION AND
33 FINANCE SHALL PROVIDE A COPY OF ANY ASSESSMENT FOR FAILURE TO PAY BUSI-
34 NESS, CORPORATE OR PERSONAL INCOME TAX BY AN EMPLOYER IN THE
35 CONSTRUCTION INDUSTRY ARISING OUT OF THE MISCLASSIFICATION OF AN EMPLOY-
36 EE TO THE COMMISSIONER AND CHAIR OF THE WORKERS' COMPENSATION BOARD NO
37 LATER THAN SEVEN DAYS AFTER THE ISSUANCE OF THE ASSESSMENT.

38 (C) UPON THE ISSUANCE OF AN ORDER OR DETERMINATION BY THE COMMISSIONER
39 FOR A VIOLATION AND PENALTIES UNDER THIS ARTICLE, THE COMMISSIONER SHALL
40 PROVIDE A COPY OF THE ORDER TO THE CHAIR OF THE WORKERS' COMPENSATION
41 BOARD AND THE COMMISSIONER OF TAXATION AND FINANCE NO LATER THAN SEVEN
42 DAYS AFTER THE ISSUANCE OF THE ORDER.

43 2. FOR THE PURPOSES OF THIS SECTION, THE TERM "WILLFULLY VIOLATES"
44 MEANS A CONTRACTOR KNEW OR SHOULD HAVE KNOWN THAT HIS OR HER CONDUCT WAS
45 PROHIBITED BY THIS SECTION.

46 3. ANY CONTRACTOR WHO WILLFULLY VIOLATES SECTION EIGHT HUNDRED SIXTY-
47 ONE-C OF THIS ARTICLE SHALL BE SUBJECT TO A CIVIL PENALTY OF UP TO TWEN-
48 TY-FIVE HUNDRED DOLLARS FOR THE FIRST VIOLATION PER MISCLASSIFIED
49 EMPLOYEE AND TO A CIVIL PENALTY OF UP TO FIVE THOUSAND DOLLARS FOR EACH
50 SUBSEQUENT VIOLATION PER MISCLASSIFIED EMPLOYEE WITHIN A FIVE YEAR PERI-
51 OD.

52 4. IN ADDITION TO CIVIL PENALTIES, THE CRIMINAL PENALTIES IMPOSED ON A
53 CONTRACTOR WHO WILLFULLY VIOLATES THE PROVISIONS OF THIS ARTICLE SHALL
54 BE A MISDEMEANOR AND UPON CONVICTION SHALL BE PUNISHED FOR A FIRST
55 OFFENSE BY IMPRISONMENT FOR NOT MORE THAN THIRTY DAYS OR A FINE NOT TO
56 EXCEED TWENTY-FIVE THOUSAND DOLLARS AND FOR A SUBSEQUENT OFFENSE BY
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1 IMPRISONMENT FOR NOT MORE THAN SIXTY DAYS OR A FINE NOT TO EXCEED FIFTY
2 THOUSAND DOLLARS.

3 5. IF THE CONTRACTOR IS A CORPORATION, ANY OFFICER OF SUCH CORPORATION
4 OR SHAREHOLDER WHO OWNS OR CONTROLS AT LEAST TEN PERCENT OF THE
5 OUTSTANDING STOCK OF SUCH CORPORATION WHO KNOWINGLY PERMITS THE CORPO-
6 RATION TO WILLFULLY VIOLATE THE PROVISIONS OF THIS ARTICLE SHALL ALSO BE
7 IN VIOLATION OF THIS ARTICLE AND THE CIVIL AND CRIMINAL PENALTIES HEREIN
8 SHALL ATTACH TO SUCH OFFICER UPON CONVICTION.

9 6. ANY CONTRACTOR SUBJECT TO CIVIL PENALTIES UNDER THIS ARTICLE SHALL
10 ALSO BE SUBJECT TO ANY OTHER APPLICABLE PENALTIES OR REMEDIES PROVIDED
11 BY LAW FOR FAILURE TO PAY ANY OTHER STATUTORY PAYMENT OR COVERAGE OBLI-
12 GATIONS, INCLUDING BUT NOT LIMITED TO, UNEMPLOYMENT INSURANCE, WORKERS'
13 COMPENSATION INSURANCE, OR BUSINESS, CORPORATE OR PERSONAL INCOME TAX,
14 AS FOLLOWS:

15 (A) FOR FAILURE TO PAY UNEMPLOYMENT INSURANCE TAX, THE PENALTIES
16 IMPOSED BY SECTION FIVE HUNDRED SEVENTY OF THIS CHAPTER.

17 (B) FOR INTENTIONAL AND MATERIAL UNDERSTATEMENT OR CONCEALMENT OF
18 PAYROLL OR FAILURE TO SECURE WORKERS' COMPENSATION INSURANCE, THE PENAL-
19 TIES IMPOSED BY PARAGRAPH (D) OF SUBDIVISION ONE OF SECTION FIFTY-TWO OF
20 THE WORKERS' COMPENSATION LAW, AND FOR FAILURE TO KEEP A TRUE AND ACCU-
21 RATE RECORD PURSUANT TO SECTION ONE HUNDRED THIRTY-ONE OF THE WORKERS'
22 COMPENSATION LAW, THE PENALTIES OF SECTION ONE HUNDRED THIRTY-ONE OF THE
23 WORKERS' COMPENSATION LAW.

24 (C) FOR FAILURE TO PAY BUSINESS, CORPORATE OR PERSONAL INCOME TAX, THE
25 PENALTIES IMPOSED BY SECTION SIX HUNDRED EIGHTY-FIVE AND ONE THOUSAND
26 EIGHTY-FIVE OF THE TAX LAW.

27 7. ANY CONTRACTOR OR ANY OFFICER OR SHAREHOLDER WHO OWNS OR CONTROLS
28 AT LEAST TEN PERCENT OF THE OUTSTANDING STOCK OF SUCH CORPORATION THAT
29 HAS BEEN CONVICTED OF A MISDEMEANOR SHALL BE SUBJECT TO DEBARMENT AND BE
30 INELIGIBLE TO SUBMIT ABID ON OR BE AWARDED ANY PUBLIC WORKS CONTRACT
31 WITH THE STATE, ANY MUNICIPAL CORPORATION, PUBLIC BENEFIT CORPORATION,
32 PUBLIC AUTHORITY OR PUBLIC BODY FOR A PERIOD OF UP TO ONE YEAR FROM THE
33 DATE OF SUCH CONVICTION OR FINAL DETERMINATION, OR UP TO FIVE YEARS IN
34 THE EVENT OF ANY SUBSEQUENT VIOLATION.

35 8. ANY SUBSTANTIALLY OWNED AFFILIATED ENTITY OF A CONTRACTOR, AS
36 DEFINED BY PARAGRAPH G OF SUBDIVISION FIVE OF SECTION TWO HUNDRED TWENTY
37 OF THIS CHAPTER, SHALL BE SUBJECT TO THE SAME CIVIL PENALTY PROVIDED
38 UNDER THIS ARTICLE FOR A VIOLATION OF SUCH PROVISION.

39 9. ANY PENALTIES IMPOSED UNDER THIS SECTION BY THE COMMISSIONER SHALL
40 BE APPEALED TO THE INDUSTRIAL BOARD OF APPEALS IN ACCORDANCE WITH ARTI-
41 CLE THREE OF THIS CHAPTER. ANY PENALTIES IMPOSED UNDER THIS SECTION BY
42 THE WORKERS' COMPENSATION BOARD OR COMMISSIONER OF TAXATION AND FINANCE
43 SHALL BE APPEALED IN THE SAME MANNER AS THE UNDERLYING VIOLATION.

44 10. NOTHING IN THIS SECTION SHALL LIMIT THE AVAILABILITY OF OTHER
45 REMEDIES AT LAW OR IN EQUITY FOR A VIOLATION OF THIS ARTICLE.

46 11. ANY FEE OR PENALTY ASSESSED FOR A VIOLATION OF THIS ARTICLE SHALL

47 BE DEPOSITED INTO THE DEPARTMENT'S FEE AND PENALTY ACCOUNT.
48 S 861-F. RETALIATION. 1. IT IS A VIOLATION OF THIS ARTICLE FOR AN
49 EMPLOYER OR ANY AGENT OF ANY EMPLOYER, TO RETALIATE THROUGH DISCHARGE OR
50 IN ANY OTHER MANNER AGAINST ANY PERSON IN THE TERMS OF CONDITIONS OF HIS
51 OR HER EMPLOYMENT FOR EXERCISING ANY RIGHTS GRANTED UNDER THIS ARTICLE
52 FOR:
53 (A) MAKING, OR THREATENING TO MAKE, A COMPLAINT TO AN EMPLOYER,
54 CO-WORKER OR TO A PUBLIC BODY THAT RIGHTS GUARANTEED UNDER THIS ARTICLE
55 HAVE BEEN VIOLATED;
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1 (B) CAUSING TO BE INSTITUTED ANY PROCEEDING UNDER OR RELATED TO THIS
2 ARTICLE; OR
3 (C) PROVIDING INFORMATION TO, OR TESTIFYING BEFORE, ANY PUBLIC BODY
4 CONDUCTING AN INVESTIGATION, HEARING OR INQUIRY INTO ANY SUCH VIOLATION
5 OF A LAW, RULE OR REGULATION BY SUCH EMPLOYER. NOTHING IN THIS SECTION
6 SHALL LIMIT THE COMMISSIONER'S AUTHORITY UNDER SECTION TWO HUNDRED
7 FIFTEEN OF THE LABOR LAW, OR ANY OTHER STATUTE.
8 2. ANY ACT OF RETALIATION UNDER THIS SECTION SHALL SUBJECT AN EMPLOYER
9 TO THE CIVIL PENALTIES UNDER SECTION EIGHT HUNDRED SIXTY-ONE-E OF THIS
10 ARTICLE, OR TO A PRIVATE CAUSE OF ACTION, OR BOTH.
11 S 2. Paragraph (b) of subdivision 1 of section 511 of the labor law is
12 amended by adding a new subparagraph 1-b to read as follows:
13 (1-B) AS AN EMPLOYEE IN THE CONSTRUCTION INDUSTRY UNLESS THE PRESUMP-
14 TION OF EMPLOYMENT CAN BE OVERCOME, AS PROVIDED UNDER SECTION EIGHT
15 HUNDRED SIXTY-ONE-C OF THIS CHAPTER; OR
16 S 3. The opening paragraph of subdivision 4 of section 2 of the work-
17 ers' compensation law, as amended by chapter 205 of the laws of 1993, is
18 amended to read as follows:
19 "Employee" means a person engaged in one of the occupations enumerated
20 in section three OF THIS ARTICLE or who is in the service of an employer
21 whose principal business is that of carrying on or conducting a hazard-
22 ous employment upon the premises or at the plant, or in the course of
23 his OR HER employment away from the plant of his OR HER employer;
24 "EMPLOYEE" SHALL ALSO MEAN FOR THE PURPOSES OF THIS CHAPTER ANY INDIVID-
25 UAL PERFORMING SERVICES IN CONSTRUCTION FOR A CONTRACTOR WHO DOES NOT
26 OVERCOME THE PRESUMPTION OF EMPLOYMENT AS PROVIDED UNDER SECTION EIGHT
27 HUNDRED SIXTY-ONE-C OF THE LABOR LAW; "employee" shall also mean for the
28 purposes of this chapter civil defense volunteers who are personnel of
29 volunteer agencies sponsored or authorized by a local office under regu-
30 lations of the civil defense commission, to the extent of the provisions
31 of groups seventeen and nineteen; "employee" shall at the election of a
32 municipal corporation made pursuant to local law duly enacted also mean
33 a member of an auxiliary police organization authorized by local law;
34 and for the purposes of this chapter only a newspaper carrier under the
35 age of eighteen years as defined in section thirty-two hundred twenty-
36 eight of the education law, and shall not include domestic servants
37 except as provided in section three of this chapter, and except where
38 the employer has elected to bring such employees under the law by secur-
39 ing compensation in accordance with the terms of section fifty of this
40 chapter. The term "employee" shall not include persons who are members
41 of a supervised amateur athletic activity operated on a non-profit
42 basis, provided that said members are not also otherwise engaged or
43 employed by any person, firm or corporation participating in said
44 athletic activity, nor shall it include the spouse or minor child of an
45 employer who is a farmer unless the services of such spouse or minor
46 child shall be engaged by said employer under an express contract of
47 hire nor shall it include an executive officer of a corporation who at
48 all times during the period involved owns all of the issued and

49 outstanding stock of the corporation and holds all of the offices pursu-
50 ant to paragraph (e) of section seven hundred fifteen of the business
51 corporation law or two executive officers of a corporation who at all
52 times during the period involved between them own all of the issued and
53 outstanding stock of such corporation and hold all such offices except
54 as provided in subdivision six of section fifty-four of this chapter
55 provided, however, that where there are two executive officers of a
56 corporation each officer must own at least one share of stock, nor shall
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1 it include a self-employed person or a partner of a partnership as
2 defined in section ten of the partnership law who is not covered under a
3 compensation insurance contract or a certificate of self-insurance as
4 provided in subdivision eight of section fifty-four of this chapter, nor
5 shall it include farm laborers except as provided in group fourteen-b of
6 section three of this chapter. If a farm labor contractor recruits or
7 supplies farm laborers for work on a farm, such farm laborers shall for
8 the purposes of this chapter be deemed to be employees of the owner or
9 lessee of such farm. The term "employee" shall not include baby sitters
10 as defined in subdivision three of section one hundred thirty-one and
11 subdivision three of section one hundred thirty-two of the labor law or
12 minors fourteen years of age or over engaged in casual employment
13 consisting of yard work and household chores in and about a one family
14 owner-occupied residence or the premises of a non-profit, non-commercial
15 organization, not involving the use of power-driven machinery. The term
16 "employee" shall not include persons engaged by the owner in casual
17 employment consisting of yard work, household chores and making repairs
18 to or painting in and about a one-family owner-occupied residence. The
19 term "employee" shall not include the services of a licensed real estate
20 broker or sales associate if it be proven that (a) substantially all of
21 the remuneration (whether or not paid in cash) for the services
22 performed by such broker or sales associate is directly related to sales
23 or other output (including the performance of services) rather than to
24 the number of hours worked; (b) the services performed by the broker or
25 sales associate are performed pursuant to a written contract executed
26 between such broker or sales associate and the person for whom the
27 services are performed within the past twelve to fifteen months; and (c)
28 the written contract provided for in paragraph (b) [herein] OF THIS
29 SUBDIVISION was not executed under duress and contains the following
30 provisions:

31 S 4. Notwithstanding any other provision of the law to the contrary,
32 the provisions of section 861-c of the labor law, as added by section
33 one of this act, shall apply to and be utilized for all determinations
34 of a construction industry individual's employment status under the
35 labor law and the workers' compensation law, but not the tax law.

36 S 5. This act shall take effect on the sixtieth day after it shall
37 have become a law.