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Minnesota's New Independent Contractor Exemption Certificate Law

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A new state law effective January 1, 2009, requires individuals (but not corporations, limited liability companies or partnerships) who work as independent contractors in the building construction industry to obtain from the Department of Labor and Industry (DLI) an Independent Contractor Exemption Certificate (ICEC). As of January 1, 2009, for purposes of Minnesota's workers' compensation, unemployment insurance, wage and hour, and occupational safety and health laws, individuals doing building construction work without an ICEC will be deemed to be employees of the contractor for whom they are working.

To obtain an ICEC, individuals must complete and submit an application, fees and supporting documents that establish they meet the conditions required to operate as an independent contractor.

To operate as independent contractors, individuals must be able to meet the conditions set out in the law's nine-factor test. An individual who holds an ICEC is treated as an independent contractor under Minnesota law if he or she:

- maintains a separate business with the individual's own office, equipment, materials and other facilities;
- holds or has applied for a federal employer identification number or has filed business or self employment income tax returns with the Internal Revenue Service if the person has performed services in the previous year for which the individual is seeking the independent contractor exemption certificate;
- operates under contracts to perform specific services for specific amounts of money and under which the individual controls the means of performing the services;
- incurs the main expenses related to the service that the individual performs under contract;
- is responsible for the satisfactory completion of services that the individual contracts to perform and is liable for a failure to complete the service;
- receives compensation for service performed under a contract on a commission or per-job or competitive bid basis and not on any other basis;
- may realize a profit or suffer a loss under contracts to perform service;
- has continuing or recurring business liabilities or obligations; and
- the success or failure of the individual's business depends on the relationship of business receipts to expenditures.

An ICEC permits individuals to work as independent contractors. Certificate holders, however, may work as either independent contractors or as employees. Whether a certificate holder is working as an employee or an independent contractor will depend on the conditions of the particular work relationship.

Contractors who employ individuals who do not have an ICEC will face civil penalties if they do not provide workers' compensation and unemployment insurance to these individuals, and do not properly withhold state and federal taxes from their employees' pay.

DLI is responsible for the administration and enforcement of the ICEC program, and is required to share information with the Minnesota Departments of Revenue and Employment and Economic Development regarding individuals and employers who are found to be in violation of the ICEC requirements. In addition to penalties for failure to provide workers' compensation and unemployment insurance, employers may also be subject to civil penalties of up to \$5,000 per violation for violating provisions of the ICEC laws and rules. Individuals may also be subject to civil penalties if they provide false or misleading information in an ICEC application, fail to meet all requirements of the nine-factor test to qualify as an independent contractor, allow another person to use their ICEC, misrepresent their status as an independent contractor, or alter or falsify an ICEC.

If you are an individual in the building construction industry, compliance with Minnesota's new ICEC law can be costly and cumbersome. A

simpler alternative is to form a single-member limited liability company which is exempt from the ICEC requirements. The single-member LLC will not cause a change in federal income tax consequences as it is treated in the same manner as your existing sole proprietorship (i.e., reported on Schedule C of your Form 1040 return). In addition, use of an entity such as an LLC shields your personal assets from the business liabilities of the LLC.

Jeffrey C. O'Brien is a partner with Mansfield Tanick & Cohen, practicing in the areas of business and real estate law. A MSBA Board Certified Real Property Specialist, Mr. O'Brien also oversees the Firm's INCubation Center for new and emerging businesses. He represents a number of clients in the building construction industry, and he can be reached by telephone at 612-341-1263 or via email at jobrien@mansfieldtanick.com.

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