A Timely Analysis of Legal Developments

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Illinois High Court Affirms Viability of Construction Industry Classification Law

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The Illinois Supreme Court recently rejected a constitutional challenge by a roofing contractor who alleged the Illinois Employee Classification Act (ECA)[1] violates procedural due process rights and is impermissibly vague. The ECA sets parameters for lawfully classifying workers as independent contractors in the construction industry in Illinois. The ECA also, through its latest procedural amendments made in January 2014, creates a mechanism for employers in the construction industry to challenge determinations that the ECA has been violated. Handed down six years after the ECA's original effective date, the Illinois Supreme Court's decision in *Bartlow v. Costigan*2[2]means the ECA is here to stay.

The Employee Classification Act

The ECA was passed by the Illinois General Assembly on May 22, 2007, and went into effect on January 1, 2008. The stated purpose of the ECA is "to address the practice of misclassifying employees as independent contractors."[3] Despite this broadly stated aim, as drafted, the ECA applies only to the construction industry, based on an identified practice of "some contractors misclassifying individuals as independent contractors in order to avoid payroll taxes, unemployment insurance contributions, workers' compensation premiums and minimum wage and overtime payments."[4]

The ECA sets forth a presumption that "an individual performing services for a contractor is deemed to be an employee of the employer," unless certain conditions are met.[5] An individual is *not* deemed an employee if:

- the individual has been and will continue to be free from control or direction over performing the service for the contractor, both under the individual's contract of service and in fact;

1 820 ILCS 185/1 *et seq.*

2 No. 2014 IL 115152 (Ill. 2014).

3 820 ILCS 185/3.

4 56 Ill. Adm. Code 240.100(a); *see also* 820 ILCS 185/5 (defining a contractor for purposes of the ECA as an individual or legal entity "who engages in construction").

5 820 ILCS 185/10(a).

- the service performed by the individual is outside the usual course of services performed by the contractor; and
- the individual is engaged in an independently established trade, occupation, profession or business; or the individual is deemed a legitimate sole proprietor or partnership under subsection (c) of Section 10.[6]

It is considered an ECA violation for a contractor "not to designate an individual as an employee," unless the contractor is able to satisfy the above conditions of engagement.[7] Contractors must post a summary of the ECA's requirements in English, Spanish, and Polish on their official web sites and in their offices.[8] Contractors are also required to report annually to the Illinois Department of Labor all payments made to individuals who performed construction services for the contractor, but were not classified as employees.[9]

The ECA also includes penalty provisions and procedures for enforcement, which are discussed in more detail below.

The *Bartlow* Case

The plaintiffs in this case are general partners of a company in the business of installing siding, windows, seamless gutters, and roofs. Their co-plaintiffs are individuals who perform siding, window, and roof installation for the company—either as employees or independent contractors.

In September 2008, the Illinois Department of Labor notified the company it was being investigated for reported violations of the ECA. In February 2010, after reviewing 750 documents produced by the company and conducting telephone interviews with one of the plaintiffs and various individuals who had contracted with the company, the Department made a "preliminary determination" that the company had misclassified 10 individuals for work performed between 8 and 160 days in 2008, including the co-plaintiffs. The Department calculated a "potential penalty" of $1,683,000 for these violations, but also invited the company to file a response before the Department made its final determination. In March 2010 the Department sent the company notice of a second round of investigations to address newly alleged violations.

Shortly thereafter, the plaintiffs filed suit in the Circuit Court of Franklin County, Illinois, seeking to enjoin the Department from enforcing the ECA against them. Plaintiffs further sought a declaratory judgment stating the ECA is unconstitutional, because it: (1) violates the special legislation clause of the Illinois Constitution; (2) is impermissibly vague in violation of the due process clauses of the U.S. and Illinois Constitutions; (3) does not provide a meaningful opportunity to be heard in violation of the due process clauses of the U.S. and Illinois Constitutions; (4) violates the prohibition against bills of attainder in the U.S. Constitution; and (5) violates the equal protection clauses of the U.S. and Illinois Constitutions because no other industry is subjected to the same standards when seeking to hire independent contractors.

The trial court denied plaintiffs' request for a temporary restraining order. On appeal, the appellate court reversed, holding the plaintiffs had "raised a 'fair question' concerning whether the Act violates procedural due process, because the Act and the procedures promulgated pursuant to the Act do not appear to provide an accused with a meaningful opportunity to be heard."[10] The appellate court noted "it appears that the Department can levy significant fines, penalties, and sanctions merely upon its own determination that a violation of the Act has occurred, without ever affording the contractor a meaningful hearing."[11] The appellate court declined to address the plaintiffs' remaining constitutional arguments, and remanded for entry of a temporary restraining order enjoining the Department from enforcing the ECA against the plaintiffs.

On remand, the parties fully briefed the plaintiffs' constitutional claims. The trial court ruled in favor of the Department on all counts, including plaintiffs' procedural due process claim, noting the terms of the ECA did not prevent the Department from providing notice and an administrative hearing, and concluding the ECA therefore was not facially unconstitutional. The appellate court affirmed the trial court's holding, similarly focusing on the plaintiffs' procedural due process claim. The appellate court noted its concern that "the language of the statute grants the Department more than investigatory powers," but ultimately concluded that the Department "functions only in an

6 820 ILCS 185/10(b); see also 820 ILCS 185/10(c) (setting forth exemptions for "legitimate" sole proprietors and partnerships performing services for a contractor).

7 820 ILCS 185/20.

8 820 ILCS 185/15.

9 820 ILCS 185/43.

10 *Bartlow v. Shannon*, 399 Ill. App. 3d 560, 570 927 N.E.2d 88, 97 (Ill. App. Ct. 5th Dist. 2010), *appeal denied*, 237 Ill. 2d 552 (2010) (table).

11 *Id.* at 572.

investigative role . . . [with] no power to assess any fines or impose any sanctions," other than by suing in the circuit court.[12] The Department interpreted its own enforcement authority under the ECA as extending only so far as seeking voluntary settlements with contractors or issuing "no-consequences" cease and desist orders. Under this accepted interpretation, the appellate court concluded that any contractor accused of violating the ECA would be afforded all of the due process protections available in a court of law. The appellate court further found the ECA was not unconstitutionally vague, was not an unlawful delegation of legislative power, and that "the legislature was free to limit the application of the Act to the construction industry without offending the equal protection clauses or violating the prohibition against special legislation."

Detour on the Way to the Courthouse—Procedural Amendments to the ECA

On January 30, 2013, the Illinois Supreme Court granted the plaintiffs leave to appeal their constitutional claims. Less than a month later, on February 21, 2013, legislation was introduced in the Illinois General Assembly to amend the ECA by adding provisions for notice and a formal administrative hearing. Public Act 98-106 was signed into law five months later on July 23, 2013, with an effective date of January 1, 2014.

Under the amended law, the Illinois Department of Labor is still authorized to conduct investigations in response to complaints of suspected violations.[13] The Department may also (i) issue cease and desist orders, (ii) take reasonable actions to eliminate the effect of any violation, (iii) collect wages, salary, employment benefits, or other compensation due to the individual employee, and (iv) assess civil penalties.[14]

The amended procedures require the Department to notify a contractor, in writing, within 120 days of receiving a complaint (1) that a complaint has been filed; (2) the location and approximate date of the project or projects being investigated; (3) the names of the affected contractors; and (4) the nature of the allegations being investigated.[15] If the Department concludes that a contractor has violated the ECA by misclassifying an employee as an independent contractor, or by retaliating against an individual for exercising his or her rights under the ECA, "the Department shall notify the employer, in writing, of its finding and any proposed relief due and penalties assessed and that the matter will be referred to an Administrative Law Judge to schedule a formal hearing in accordance with the Illinois Administrative Procedure Act."[16] The employer then has 28 days to answer the allegations in the Department's findings, or the findings will be deemed admitted for the administrative law judge's final decision.[17] An employer may seek to vacate a final decision if, within 30 days of the administrative law judge's final decision, the employer moves to vacate demonstrating good cause for its failure to timely answer the Department's allegations.[18] The amended provisions further state the administrative law judge's final decision is subject to the Administrative Review Law, the governing statute for judicial review of an administrative agency decision.[19] Finally, the amended statute also retains the original provisions for a private right of action against a contractor who has violated the ECA.[20]

The Illinois Supreme Court's Decision in *Bartlow*

The Illinois Supreme Court analyzed only two of the plaintiffs' constitutional arguments on appeal, finding the remaining arguments to have been under-developed and, therefore, forfeited.

Regarding the plaintiffs' procedural due process claim, the court noted that the ECA's pre-amendment enforcement provisions "have been completely replaced with a new enforcement process that includes notice, a formal hearing, and administrative review."[21] Under these circumstances, the court declared that the plaintiffs' challenge to the ECA's pre-amendment enforcement provisions was moot. Because the court did not address the procedural due process claim on the merits, it vacated this non-reviewable portion of the appellate court's judgment.

12 *Bartlow v. Costigan*, 2012 IL App (5th) 110519, ¶¶ 50-51, 974 N.E.2d 937, 949 (Ill. App. Ct. 5th Dist. 2012).

13 *See generally* 820 ILCS 185/25(a).

14 *See* 820 ILCS 185/25(b); *see also* Section 40 (Penalties); Section 42 (Debarments); and Section 45 (Willful Violations).

15 820 ILCS 185/25(a).

16 820 ILCS 185/25(c).

17 820 ILCS 185/25(d).

18 *Id.*

19 820 ILCS 185/25(e).

20 See 820 ILCS 185/60.

21 *Bartlow*, No. 2014 IL 115152 ¶ 35.

Regarding the plaintiffs' vagueness challenge, the court reviewed the statutory text of the exemptions in Sections 10(b) and 10(c), and concluded these provisions "are highly detailed and specific." The court further determined that a reasonably intelligent person would understand how to qualify for an exemption, and that the provisions "are sufficiently detailed and specific to preclude arbitrary enforcement." Accordingly, the court affirmed the appellate court's judgment that Section 10 of the ECA is not unconstitutionally vague. The court was careful to note, however, its analysis was limited to the facial constitutional validity of the ECA, and the court pointedly addressed no "specific allegations of statutory compliance" regarding the plaintiffs.

Future Considerations

The *Bartlow* decision confirms the ECA's continued vitality in Illinois and sets the stage for future litigation on several factual issues that will arise, including:

- Whether an individual is sufficiently "free from control or direction"
- Whether an individual is "performing services" under the ECA
- Whether an individual is engaged in work that is "outside the usual course of services performed by the contractor"

These factual issues will be driven not only by how companies memorialize their relationships with their contractors, but also by how these relationships will be carried out in practice. Striking the correct balance between ensuring quality control and maintaining the independence of true independent contractors may be a consistent challenge for employers subject to the ECA.

Although introducing specific notice and hearing provisions may prove vitally important, it is difficult to predict how employers' hearing rights will be carried out in practice.

Employers should review their independent contractor relationships with the help of experienced counsel with these themes in mind.

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