§ 861-c. Presumption of employment in the construction industry. 1. Any person performing services for a contractor shall be classified as an employee unless the person is a separate business entity under subdivision two of this section or all of the following criteria are met, in which case the person shall be an independent contractor:

(a) the individual is free from control and direction in performing the job, both under his or her contract and in fact;

(b) the service must be performed outside the usual course of business for which the service is performed; and

(c) the individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue.

2. A business entity, including any sole proprietor, partnership, corporation or entity that may be a contractor under this section shall be considered a separate business entity from the contractor where all the following criteria are met:

(a) the business entity is performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of the contractor for whom the service is provided to specify the desired result;

(b) the business entity is not subject to cancellation or destruction upon severance of the relationship with the contractor;

(c) the business entity has a substantial investment of capital in the business entity beyond ordinary tools and equipment and a personal vehicle;

(d) the business entity owns the capital goods and gains the profits and bears the losses of the business entity;

(e) the business entity makes its services available to the general public or the business community on a continuing basis;

(f) the business entity includes services rendered on a Federal Income Tax Schedule as an independent business or profession;

(g) the business entity performs services for the contractor under the business entity's name;

(h) when the services being provided require a license or permit, the business entity obtains and pays for the license or permit in the business entity's name;

(i) the business entity furnishes the tools and equipment necessary to provide the service;

(j) if necessary, the business entity hires its own employees without contractor approval, pays the employees without reimbursement from the contractor and reports the employees' income to the Internal Revenue Service;

(k) the contractor does not represent the business entity as an employee of the contractor to its customers; and

(l) the business entity has the right to perform similar services for others on whatever basis and whenever it chooses.

3. The failure to withhold federal or state income taxes or to pay unemployment compensation contributions or workers' compensation premiums with respect to an individual's wages shall not be considered in making a determination under this section, except as set forth in paragraph (f) of subdivision two of this section.

4. An individual's act of securing workers' compensation insurance with a carrier as a sole proprietor, partnership or otherwise shall not be binding on any determination under this section.

5. When a business entity meets the definition of a separate business entity pursuant to subdivision two of this section, the separate business entity will be considered a contractor subject to all the provisions of this article in regard to the classification of individuals performing services for it.