

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2540 Session of 2012

INTRODUCED BY SABATINA, BARBIN, BRADFORD, BRENNAN, BRIGGS, BROWNLEE, BURNS, BUXTON, CALTAGIRONE, CARROLL, COHEN, D. COSTA, P. COSTA, CRUZ, CURRY, DEASY, DeLUCA, DePASQUALE, DERMODY, DONATUCCI, FABRIZIO, FARRY, FRANKEL, GALLOWAY, GEORGE, GERBER, GERGELY, GIBBONS, GOODMAN, HALUSKA, HANNA, HARKINS, JOSEPHS, W. KELLER, KORTZ, KOTIK, MAHONEY, MANN, MATZIE, McGEEHAN, MUNDY, MURT, NEUMAN, M. O'BRIEN, PASHINSKI, PAYTON, RAVENSTAHL, READSHAW, SANTARSIERO, SANTONI, K. SMITH, M. SMITH, STURLA, TAYLOR, WATERS, WHEATLEY, WHITE, YOUNGBLOOD, NEILSON AND SCHMOTZER, JULY 2, 2012

REFERRED TO COMMITTEE ON LABOR AND INDUSTRY, JULY 2, 2012

AN ACT

1 Providing for the criteria for independent contractors in the
2 commercial carrier industry and for the powers and duties of
3 the Department of Labor and Industry and the Secretary of
4 Labor and Industry; and imposing penalties.

5 The General Assembly of the Commonwealth of Pennsylvania
6 hereby enacts as follows:

7 Section 1. Short title.

8 This act shall be known and may be cited as the Commercial
9 Carrier Industry Workplace Misclassification Act.

10 Section 2. Definitions.

11 The following words and phrases when used in this act shall
12 have the meanings given to them in this section unless the
13 context clearly indicates otherwise:

14 "Commercial carrier." Any employer in this Commonwealth
15 holding out, offering or undertaking, directly or indirectly,

1 service for compensation to the public for the transportation of
2 passengers or property, or both, or any class of passengers or
3 property by, through, over, above or under land, water or air.

4 "Department." The Department of Labor and Industry of the
5 Commonwealth.

6 "Employee." Either of the following:

7 (1) In relation to workers' compensation, the term shall
8 have the meaning given to it in section 104 of the act of
9 June 2, 1915 (P.L.736, No.338), known as the Workers'
10 Compensation Act.

11 (2) In relation to unemployment compensation, the term
12 shall have the meaning given to it in section 4(i) of the act
13 of December 5, 1936 (2nd Sp.Sess., 1937 P.L.2897, No.1),
14 known as the Unemployment Compensation Law.

15 "Employer." Either of the following:

16 (1) In relation to workers' compensation, the term shall
17 have the meaning given to it in section 103 of the act of
18 June 2, 1915 (P.L.736, No.338), known as the Workers'
19 Compensation Act.

20 (2) In relation to unemployment compensation, the term
21 shall have the meaning given to it in section 4(j) of the act
22 of December 5, 1936 (2nd Sp.Sess., 1937 P.L.2897, No.1),
23 known as the Unemployment Compensation Law.

24 "Secretary." The Secretary of Labor and Industry of the
25 Commonwealth or the secretary's authorized representative.

26 "Unemployment Compensation Law." The act of December 5, 1936
27 (2nd Sp.Sess., 1937 P.L.2897, No.1), known as the Unemployment
28 Compensation Law.

29 "Workers' Compensation Act." The act of June 2, 1915
30 (P.L.736, No.338), known as the Workers' Compensation Act.

1 Section 3. Independent contractors.

2 (a) General rule.--For purposes of workers' compensation,
3 unemployment compensation and improper classification of
4 employees provided herein, an individual who performs services
5 in the commercial carrier industry for remuneration is an
6 independent contractor only if:

7 (1) The individual has a written contract to perform
8 such services.

9 (2) The individual is free from control or direction
10 over performance of such services both under the contract of
11 service and in fact.

12 (3) As to such services, the individual is customarily
13 engaged in an independently established trade, occupation,
14 profession or business.

15 (b) Criteria.--An individual is customarily engaged in an
16 independently established trade, occupation, profession or
17 business with respect to services the individual performs in the
18 commercial carrier industry only if:

19 (1) The individual possesses the essential tools,
20 equipment and other assets necessary to perform the services
21 independent of the person for whom the services are
22 performed.

23 (2) The individual's arrangement with the person for
24 whom the services are performed is such that the individual
25 shall realize a profit or suffer a loss as a result of
26 performing the services.

27 (3) The individual performs the services through a
28 business in which the individual has a proprietary interest.

29 (4) The individual maintains a business location that is
30 separate from the location of the person for whom the

1 services are being performed.

2 (5) The individual:

3 (i) previously performed the same or similar
4 services for another person in accordance with paragraphs
5 (1), (2), (3) and (4) while free from direction or
6 control over performance of the services, both under the
7 contract of service and in fact; or

8 (ii) holds himself out to other persons as available
9 and able, and in fact is available and able, to perform
10 the same or similar services in accordance with
11 paragraphs (1), (2), (3) and (4) while free from
12 direction or control over performance of the services.

13 (6) The individual maintains liability insurance during
14 the term of this contract of at least \$50,000.

15 (c) Factors not to be considered.--The failure to withhold
16 Federal or State income taxes or pay unemployment compensation
17 contributions or workers' compensation premiums with respect to
18 an individual's remuneration shall not be considered in
19 determining whether the individual is an independent contractor
20 for purposes of the Workers' Compensation Act or the
21 Unemployment Compensation Law.

22 (d) Workers' compensation.--

23 (1) An individual who is an independent contractor as
24 determined under this section is not an employee for purposes
25 of the Workers' Compensation Act. For purposes of this
26 section, each employment relationship shall be considered
27 separately.

28 (2) Nothing in this act may be construed to affect
29 section 321(2) of the Workers' Compensation Act.

30 (e) Unemployment compensation.--

1 (1) For purposes of section 4(1)(2)(B) of the
2 Unemployment Compensation Law, an individual is customarily
3 engaged in an independently established trade, occupation,
4 profession or business with respect to services the
5 individual performs in the construction industry only if the
6 criteria in subsection (b) are satisfied.

7 (2) Except as provided in paragraph (1), nothing in this
8 act shall be construed to affect any exclusion from
9 "employment" as defined in the Unemployment Compensation Law.

10 Section 4. Improper classification of employees.

11 (a) Violation.--An employer, or officer or agent of an
12 employer, shall be in violation of this act and shall be subject
13 to the penalties, remedies and actions contained in this act if
14 the employer, officer or agent:

15 (1) fails to properly classify an individual as an
16 employee for purposes of the Workers' Compensation Act and
17 fails to provide the coverage required under the Workers'
18 Compensation Act; or

19 (2) fails to properly classify an individual as an
20 employee for purposes of the Unemployment Compensation Law
21 and fails to pay contributions, reimbursements or other
22 amounts required to be paid under the Unemployment
23 Compensation Law.

24 (b) Separate offenses.--Each individual who is not properly
25 classified as an employee shall be the basis of a separate
26 violation of this section.

27 (c) Order to show cause.--

28 (1) If the secretary receives information indicating
29 that any person has violated this act, the secretary may
30 investigate the matter and issue an order to show cause why

1 the person should not be found in violation of this act.

2 (2) A person served with an order to show cause shall
3 have a period of 20 days from the date the order is served to
4 file an answer in writing.

5 (3) If the person fails to file a timely and adequate
6 answer to the order to show cause, the secretary may,
7 following notice and hearing, do any of the following:

8 (i) petition a court of competent jurisdiction to
9 issue a stop-work order as provided in section 7; or

10 (ii) immediately assess penalties as provided in
11 section 6.

12 (d) Enforcement.--If, subsequent to issuing an order to show
13 cause under subsection (c), the secretary finds probable cause
14 that an employer has committed a criminal violation of this act,
15 the secretary shall refer the matter to the Office of Attorney
16 General for investigation or impose administrative penalties
17 under section 6.

18 (e) Acting in concert with other parties.--A party that does
19 not meet the definition of "employer" in section 2, but which
20 intentionally contracts with an employer knowing the employer
21 intends to misclassify employees in violation of this act, shall
22 be subject to the same penalties, remedies or other actions as
23 the employer found to be in violation of this act.

24 (f) Defense.--It shall be a defense to an alleged violation
25 of this section if the person for whom the services are
26 performed in good faith believed that the individual who
27 performed the services qualified as an independent contractor at
28 the time the services were performed.

29 Section 5. Criminal penalties.

30 (a) Grading.--An employer, or officer or agent of an

1 employer, that intentionally violates section 4(a) commits:

2 (1) A misdemeanor of the third degree for a first
3 offense.

4 (2) A misdemeanor of the second degree for a second or
5 subsequent offense.

6 (b) Summary offense.--An employer, or officer or agent of an
7 employer, that negligently fails to properly classify an
8 individual as an employee under section 4(a) commits a summary
9 offense and shall, upon conviction, be sentenced to pay a fine
10 of not more than \$1,000. Evidence of a prior conviction under
11 this subsection shall be admissible as evidence of intent under
12 subsection (a).

13 (c) Concurrent jurisdiction.--

14 (1) The Attorney General shall have concurrent
15 prosecutorial jurisdiction with the district attorney of the
16 appropriate county for violations under this section and any
17 offense arising out of the activity prohibited by this
18 section.

19 (2) No person charged with a violation of this section
20 by the Attorney General shall have standing to challenge the
21 authority of the Attorney General to prosecute the case, and
22 if a challenge is made, the challenge shall be dismissed, and
23 no relief shall be available in the courts of this
24 Commonwealth to the person making the challenge.

25 Section 6. Administrative penalties.

26 (a) General rule.--When the secretary finds that a person
27 has violated this act, the secretary may assess and collect
28 civil penalties of not more than \$1,000 for the first violation,
29 and not more than \$2,500 for each subsequent violation.

30 (b) Factors to be considered.--When determining the amount

1 of the penalty to be imposed, the secretary shall consider
2 factors including, but not limited to:

3 (1) The history of previous violations by the employer.

4 (2) The seriousness of the violation.

5 (3) The good faith of the employer.

6 (4) The size of the employer's business.

7 Section 7. Stop-work orders.

8 (a) Issuance of order.--

9 (1) If the secretary determines, subsequent to the
10 issuance of an order to show cause under section 4(c), that
11 an employer, or officer or agent of the employer, has
12 intentionally failed to properly classify an individual as an
13 employee under section 4(a), the secretary may petition a
14 court of competent jurisdiction to issue a stop-work order
15 requiring the cessation of work by individuals who are
16 improperly classified within 24 hours of the effective date
17 of the order, or in the event that a majority of individuals
18 working at a site are improperly classified, requiring the
19 cessation of all business operations of that employer at each
20 site at which a violation occurred within 24 hours of the
21 effective date of the order.

22 (2) The order shall take effect when served upon the
23 employer, or for a particular employer worksite, when served
24 at the worksite. The order shall remain in effect until the
25 court issues an order releasing the stop-work order or upon
26 finding that the employer, or officer or agent of the
27 employer, is no longer in violation of this act.

28 (3) An order releasing a stop-work order may include a
29 requirement that the employer file with the department
30 periodic reports for a probationary period that shall not

1 exceed two years demonstrating the employer's continued
2 compliance with this act.

3 (b) Applicability of orders and penalties.--Stop-work orders
4 under subsection (a) and penalties under subsection (c) shall be
5 in effect against any successor corporation or business entity
6 that has one or more of the same principals or officers as the
7 employer against whom the stop-work order was issued or
8 penalties imposed and which is engaged in the same or equivalent
9 trade or activity.

10 (c) Penalty.--The court shall assess a penalty of \$1,000 per
11 day against an employer for each day that the employer conducts
12 business operations that are in violation of a stop-work order
13 issued under this section.

14 Section 8. Procedure.

15 (a) Hearings.--Actions taken under sections 4(c) and 6 shall
16 be subject to the provisions of 2 Pa.C.S. (relating to
17 administrative law and procedure).

18 (b) Subpoena powers.--The department shall have the power to
19 subpoena witnesses, administer oaths, examine witnesses and take
20 testimony or compel the production of documents. The secretary
21 may petition the Commonwealth Court to enforce any order or
22 subpoena issued under this act.

23 Section 9. Certain agreement prohibited.

24 (a) Violation.--No person may require or demand that an
25 individual enter into an agreement or sign a document that
26 results in the improper classification of that individual as an
27 independent contractor.

28 (b) Penalty.--A violation of subsection (a) shall be
29 punishable by an administrative fine of not less than \$1,000 and
30 not more than \$2,500. Each violation shall be considered a

1 separate offense under this section.

2 Section 10. Retaliation for action prohibited.

3 (a) General rule.--It shall be unlawful for an employer, or
4 officer or agent of an employer, to discriminate in any manner
5 or take adverse action against any person in retaliation for
6 exercising rights protected under this act. Rights protected
7 under this act include, but are not limited to, the right to
8 file a complaint or inform any person about an employer's
9 noncompliance with this act.

10 (b) Good faith allegations of noncompliance.--A person who
11 in good faith alleges noncompliance with this act shall be
12 afforded the rights provided by this act, notwithstanding the
13 person's failure to prevail on the merits.

14 (c) Rebuttable presumptions.--Taking adverse action against
15 a person within 90 days of the person's exercise of rights
16 protected under this act shall raise a rebuttable presumption of
17 having done so in retaliation for the exercise of those rights.

18 Section 11. Availability of information.

19 The department shall create a poster for job sites which
20 outlines the requirements and penalties under this act and shall
21 make the poster available on its Internet website. At the
22 discretion of the secretary, a toll-free hotline telephone
23 number may be established to receive alleged violations.

24 Section 12. Use of penalty funds.

25 Any sum collected as a penalty under:

26 (1) Sections 6, 7 and 9 for a violation of section 4(a)
27 (1) shall be paid into the Workers' Compensation
28 Administration Fund.

29 (2) Sections 6, 7 and 9 for a violation of section 4(a)
30 (2) shall be paid into the Special Administration Fund

created under section 601.1 of the Unemployment Compensation Law.

(3) Section 9 for a violation of any other provision of this act shall be divided equally between the Workers' Compensation Administration Fund and the Special Administration Fund.

Section 13. Rules and regulations.

The department shall promulgate regulations necessary to implement this act within 180 days of the effective date of this section.

Section 14. Annual report required.

The department shall submit an annual report to the General Assembly by March 1 of the year following the first full year in which this act is in effect, and each year thereafter, detailing, to the maximum extent possible, data on the previous calendar year's administration and enforcement of this act. The department may include any relevant facts and statistics that it believes necessary in the content of the report.

Section 15. Severability.

The provisions of this act are severable. If any provision of this act or its application to any individual or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application.

Section 16. Construction of law.

(a) Other laws.--Nothing contained in this act may be construed to impair or affect in any manner the ability of the department and secretary to carry out the powers and duties prescribed by the laws of this Commonwealth.

(b) Other industries.--The department is not precluded from

1 finding misclassification in any industry on the basis of the
2 laws of this Commonwealth.
3 Section 30. Effective date.
4 This act shall take effect immediately.