

SENATE APPROPRIATIONS COMMITTEE FISCAL NOTE

BILL NO. House Bill 400

PRINTER'S NO. 4289

AMOUNT

No Fiscal Impact

FUND

General

DATE INTRODUCED

March 19, 2009

PRIME SPONSOR

Representative Lentz

HISTORY OF BILL

Referred to LABOR RELATIONS, March 19, 2009

Reported as amended, April 27, 2009

First consideration, April 27, 2009

Laid on the table, April 27, 2009

Removed from table, April 28, 2009

Re-committed to APPROPRIATIONS, April 28, 2009

Re-reported as committed, April 29, 2009

Second consideration, with amendments, April 29, 2009

(Remarks see House Journal Page 699-709), April 29, 2009

Third consideration and final passage, May 5, 2009 (126-72)

(Remarks see House Journal Page 743-756), May 5, 2009

In the Senate

Referred to LABOR AND INDUSTRY, May 11, 2009

Reported as amended, Sept. 21, 2010

First consideration, Sept. 21, 2010

Second consideration, Sept. 22, 2010

Re-referred to APPROPRIATIONS, Sept. 22, 2010

Re-reported as committed, Sept. 28, 2010

DESCRIPTION AND PURPOSE OF BILL

House Bill 400 establishes the Construction Workplace Misclassification Act, which establishes criteria for independent contractors and creates criminal penalties for employers who misclassify employees as "independent contractors."

The bill states that for purposes of the Unemployment Compensation Law and the Workers' Compensation Act, and improper classification of employees, an individual who performs services in the construction industry shall be deemed an independent contractor only if:

SENATE APPROPRIATIONS COMMITTEE FISCAL NOTE

- 1) The individual has a written contract to perform such services;
- 2) The individual is free from control and direction over performance of such services;
- 3) The individual is customarily engaged in an independently established trade, occupation, profession or business.

To fulfill the third criteria above, an individual must demonstrate that:

- 1) The individual possesses the essential tools necessary to perform the services.
- 2) The individual's arrangements with the person for whom the services are being performed is such that the individual shall realize a profit or loss.
- 3) The individual has a proprietary interest in the business.
- 4) The individual maintains a separate business location.
- 5) The individual has previously performed the same or similar services or holds himself out to other persons as available to perform similar services.
- 6) The individual maintains a minimum of \$50,000 in liability insurance.

An employer shall be in violation of this Act if the employer fails to properly classify an individual as an employee for purposes of the Workers' Compensation Act or the Unemployment Compensation Act. Each individual who is not properly classified as an employee is the basis for a separate offense. A party who intentionally contracts with an employer knowing that the employer intends to misclassify employees shall be subject to the same penalties as an employer found to be in violation of the Act.

The Secretary of Labor and Industry shall determine if an employer or other person has violated the act. The Secretary may refer any suspected violation to the Attorney General's office for investigation or prosecution.

Criminal penalties are defined by the act. If an employer intentionally violates the act, he commits a third degree misdemeanor for the first offense and a second degree misdemeanor for a second or subsequent offense. If the employer negligently violates the act, he commits a summary offense and upon conviction, could be sentenced to pay a fine of not more than \$1,000. The Attorney General and the district attorney in the relevant county will have concurrent jurisdiction to prosecute violations related to improper classification of employees.

SENATE APPROPRIATIONS COMMITTEE FISCAL NOTE

Administrative penalties may be imposed at the discretion of the Secretary of Labor and Industry in an amount not less than \$1,000 for the first violation and not more than \$2,500 for each subsequent violation of the Act.

Stop-work orders may be issued by the Secretary if employers are found to have intentionally failed to properly classify an individual as an employee. The Secretary may petition a court of competent jurisdiction to issue a stop-work order. Such a stop-work order requires the cessation of work by individuals who are improperly classified within 24 hours of the effective date of the order. Or, in the event that the majority of the individuals working at the site are improperly classified, the order requires the cessation of all business operations at each site at which the violations occurred. Stop-work orders will remain in effect against any successor corporation or business entity which has one or more of the same principals or officers. A fine of \$1,000 per day shall be imposed on an employer who conducts business operations in violation of the stop-work order.

The Department of Labor and Industry is required to create a poster for job sites which outlines the requirements and penalties under the Act.

An annual report must be submitted to the General Assembly by March 1st detailing the previous calendar year's administration and enforcement of the Act.

The fines collected for specific violations of the Workers' Compensation Act and the Unemployment Compensation Law are deposited into special administrative funds established under each law. Any sums collected for violations in this Act, as related to improper classification of the employee for purposes of the Workers' Compensation Act, or for improper classification of the employee for the purposes of the Unemployment Compensation Law, shall be deposited in the respective accounts. Fines which are collected but do not allege specific violation of either law, are divided equally between the two funds.

The Department of Labor and Industry shall not be required to enforce this Act until adequate funding is appropriated.

The act takes effect in 120 days.

SENATE APPROPRIATIONS COMMITTEE

FISCAL NOTE

FISCAL IMPACT:

The Department states their enforcement of the Act would have no fiscal impact to the General Fund. All fines and penalties imposed for violations of the act would be deposited in either the Workers' Compensation Administration Fund, the Special Administration Fund established by the Unemployment Compensation Law, or equally distributed between these two funds, dependent on the statute or section violated, and as specified in Section 12 of the act. The Department states that any administrative and enforcement costs incurred to implement the provisions of the act would be funded by these special funds. If the Department chooses to refer the investigation of a possible violation to the Office of the Attorney General, the office could incur additional costs to investigate and criminally prosecute a violation. Such costs would be dependent on the number and complexity of the referred cases.

In addition, Under Section 17 of the Construction Workplace Misclassification Act, the Department of Labor & Industry is not required to enforce the act until adequate funding is appropriated. Therefore, because funding was not appropriated for FY 2010-2011, there is no fiscal impact to the Commonwealth.