

CONSTRUCTION WORKPLACE MISCLASSIFICATION ACT - ENACTMENT

Act of Oct. 13, 2010, P.L. 506, No. 72

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HB 400

AN ACT

Providing for the criteria for independent contractors in the construction industry and for the powers and duties of the Department of Labor and Industry and the Secretary of Labor and Industry; and imposing penalties.

Section 1. Short title.

This act shall be known and may be cited as the Construction Workplace Misclassification Act.

Section 2. Definitions.

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

"Construction." Erection, reconstruction, demolition, alteration, modification, custom fabrication, building, assembling, site preparation and repair work done on any real property or premises under contract, whether or not the work is for a public body and paid for from public funds.

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

"Employee." Either of the following:

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

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

"Employer." Either of the following:

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

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

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

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

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

Section 3. Independent contractors.

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

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

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

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

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

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

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

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

(4) The individual maintains a business location that is separate from the location of the person for whom the services are being performed.

(5) The individual:

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

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

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

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

(d) Workers' compensation.--

(1) An individual who is an independent contractor as determined under this section is not an employee for purposes of the Workers' Compensation Act. For purposes of this

section, each employment relationship shall be considered separately.

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

(e) Unemployment compensation.--

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

(2) Except as provided in paragraph (1), nothing in this act shall be construed to affect any exclusion from "employment" as defined in the Unemployment Compensation Law. Section 4. Improper classification of employees.

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

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

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

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

(c) Order to show cause.--

(1) If the secretary receives information indicating that any person has violated this act, the secretary may investigate the matter and issue an order to show cause why the person should not be found in violation of this act.

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

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

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

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

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

(e) Acting in concert with other parties.--A party that does not meet the definition of "employer" in section 2, but which intentionally contracts with an employer knowing the employer

intends to misclassify employees in violation of this act, shall be subject to the same penalties, remedies or other actions as the employer found to be in violation of this act.

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

Section 5. Criminal penalties.

(a) Grading.--An employer, or officer or agent of an employer, that intentionally violates section 4(a) commits:

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

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

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

(c) Concurrent jurisdiction.--

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

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

Section 6. Administrative penalties.

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

(b) Factors to be considered.--When determining the amount of the penalty to be imposed, the secretary shall consider factors including, but not limited to:

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

(2) The seriousness of the violation.

(3) The good faith of the employer.

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

Section 7. Stop-work orders.

(a) Issuance of order.--

(1) If the secretary determines, subsequent to the issuance of an order to show cause under section 4(c), that an employer, or officer or agent of the employer, has intentionally failed to properly classify an individual as an employee under section 4(a), the secretary may petition a court of competent jurisdiction to issue a stop-work order requiring 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 a majority of individuals working at a site are improperly classified, requiring the cessation of all business operations of that employer at each site at which a violation occurred within 24 hours of the effective date of the order.

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

(3) An order releasing a stop-work order may include a requirement that the employer file with the department periodic reports for a probationary period that shall not exceed two years demonstrating the employer's continued compliance with this act.

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

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

Section 8. Procedure.

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

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

Section 9. Certain agreement prohibited.

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

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

Section 10. Retaliation for action prohibited.

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

(b) Good faith allegations of noncompliance.--Any person who

in good faith alleges noncompliance with this act shall be afforded the rights provided by this act, notwithstanding the person's failure to prevail on the merits.

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

Section 11. Availability of information.

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

Section 12. Use of penalty funds.

Any sum collected as a penalty under:

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

(2) Sections 6, 7 and 9 for a violation of section 4(a)(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 may promulgate rules and regulations necessary to implement this act.

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 shall 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 finding misclassification in any industry on the basis of the laws of this Commonwealth.

Section 17. Funding.

The department shall not be required to enforce this act until adequate funding is appropriated.

Section 30. Effective date.

This act shall take effect in 120 days.