
THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2400 Session of
2008

INTRODUCED BY LENTZ, BELFANTI, GERBER, DIGIROLAMO, W. KELLER, McCALL, EACHUS, CAPPELLI, MUSTIO, SWANGER, GINGRICH, ADOLPH, BARRAR, BIANCUCCI, BISHOP, BLACKWELL, BRENNAN, CALTAGIRONE, CARROLL, CIVERA, COHEN, DeLUCA, DePASQUALE, GEORGE, GERGELY, GODSHALL, GOODMAN, GRUCELA, HARHAI, HARKINS, HORNAMAN, JOSEPHS, KENNEY, KOTIK, KULA, MANDERINO, MANN, McGEEHAN, McILVAINE SMITH, MELIO, MYERS, M. O'BRIEN, PASHINSKI, PETRONE, RAYMOND, READSHAW, ROEBUCK, SABATINA, SHIMKUS, SIPTROTH, K. SMITH, M. SMITH, SOLOBAY, STAIRS, SURRA, J. TAYLOR, R. TAYLOR, WAGNER, WALKO, WATERS AND J. WHITE, APRIL 3, 2008

REFERRED TO COMMITTEE ON LABOR RELATIONS, APRIL 3, 2008

AN ACT

1 Providing for the proper classification of employees for certain
2 purposes; and imposing penalties.

3 The General Assembly of the Commonwealth of Pennsylvania
4 hereby enacts as follows:

5 Section 1. Short title.

6 This act shall be known and may be cited as the Employee
7 Misclassification Prevention Act.

8 Section 2. Legislative intent.

9 The General Assembly finds that employers who improperly
10 classify employees as independent contractors deprive these
11 workers of benefits, while reducing the employers' Federal and
12 State tax withholdings and related obligations. This practice
13 puts businesses who comply with applicable law at a competitive

1 disadvantage with those that do not follow the law.

2 Section 3. Definitions.

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

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

8 "Employer." The term includes any individual, partnership,
9 association, joint stock company, corporation, business trust or
10 any other person or groups of persons acting directly or
11 indirectly in the interest of an employer in relation to an
12 employee.

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

15 Section 4. Performance of services.

16 (a) Applicability.--Services performed by an individual for
17 wages shall be deemed to be employment subject to this act, and
18 the individual shall be considered an employee of the party that
19 pays the wages, unless and until it is shown to the satisfaction
20 of the department that:

21 (1) the individual has been and will continue to be free
22 from direction and control of the employer, both under
23 contract of service and in fact;

24 (2) the service is outside the usual course of the
25 individual's business of the employer; and

26 (3) the individual is customarily engaged in an
27 independently established trade, occupation, profession or
28 business.

29 (b) Factor not to be considered.--The failure to withhold
30 Federal or State income taxes or to pay unemployment

1 compensation contributions or workers' compensation premiums
2 with respect to an individual's wages shall not be considered in
3 making a determination under this section.

4 Section 5. Improper classification of employees.

5 (a) Violation.--An employer, or an officer or agent of the
6 employer, that fails to properly classify an individual as an
7 employee in accordance with section 4 for purposes of the act of
8 June 2, 1915 (P.L.736, No.338), known as the Workers'
9 Compensation Act, the act of December 5, 1936 (2nd Sp.Sess.,
10 1937 P.L.2897, No.1), known as the Unemployment Compensation
11 Law, and Article III of the act of March 4, 1971 (P.L.6, No.2),
12 known as the Tax Reform Code of 1971, or fails to pay benefits
13 or other contributions required by law shall be subject to the
14 penalties, remedies or actions contained in this act.

15 (b) Enforcement.--When the secretary finds that an employer
16 has violated a provision of this act, the secretary shall refer
17 the matter to the Office of Attorney General for investigation
18 and prosecution. Nothing in this act shall be deemed to limit
19 the authority of the Attorney General to investigate and
20 prosecute violations of this act.

21 Section 6. Criminal penalties.

22 (a) Knowing violation.--An employer, or an officer or agent
23 of the employer, that knowingly violates section 5(a) commits a
24 felony of the third degree and shall, upon conviction, be
25 sentenced to pay a fine of not more than \$15,000 or to
26 imprisonment for not more than three and one-half years for a
27 first offense, or both, and to pay a fine of not more than
28 \$30,000 or to imprisonment for not more than seven years, or
29 both, for a subsequent offense.

30 (b) Unintentional violation.--An employer, or an officer or

1 agent of the employer, that unintentionally violates section
2 5(a) commits a misdemeanor of the third degree and shall, upon
3 conviction, be sentenced to pay a fine of not more than \$2,500
4 or to imprisonment for not more than 180 days for a first
5 offense, or both, and to pay a fine of not more than \$5,000 or
6 to imprisonment for not more than one year, or both, for a
7 subsequent offense.

8 Section 7. Civil actions and remedies.

9 (a) Debarment.--If the secretary determines, after notice
10 and hearing, that an employer, or an officer or agent of the
11 employer, has failed to properly classify an individual as an
12 employee or failed to pay required benefits or other
13 contributions as required in section 5, or upon the conviction
14 for a violation of this act, the secretary shall notify all
15 public bodies in this Commonwealth of the name of the employer,
16 and no contract shall be awarded to the employer or to any firm,
17 corporation or partnership in which the employer has an interest
18 until a period of up to three years, as determined by the
19 secretary, has elapsed from the date of the notice.

20 (b) Administrative penalties.--As an alternative to or in
21 addition to any other sanctions provided by law for a violation
22 of this act, when the secretary finds that an employer has
23 violated this act, the secretary is authorized to assess and
24 collect administrative penalties up to a maximum of \$2,500 for
25 the first violation and up to a maximum of \$5,000 for each
26 subsequent violation. When determining the amount of the penalty
27 imposed because of a violation, the secretary shall consider
28 factors which include the history of previous violations by the
29 employer, the seriousness of the violation, the good faith of
30 the employer and the size of the employer's business. Each

1 employee misclassified by the employer shall constitute a
2 separate offense.

3 (c) Actions by employees.--An individual who has not been
4 properly classified as an employee may bring a civil action for
5 damages against the employer for failing to properly classify
6 the employee if the employer had knowledge of the
7 misclassification. An individual's representative, including a
8 labor organization, may bring the action on behalf of the
9 individual or as a class action. The court may award attorney
10 fees and other costs of the action in addition to damages to an
11 individual or class of individuals who have not been properly
12 classified as employees in violation of section 5(a).

13 Section 8. Stop-work orders.

14 (a) Issuance of order.--If the secretary determines, after
15 notice and hearing, that an employer failed to properly classify
16 an individual as an employee or has failed to pay required
17 benefits or other contributions as required in section 5, the
18 secretary shall issue a stop-work order requiring the cessation
19 of all business operations within 72 hours of the determination.
20 The order shall take effect when served upon the employer or,
21 for a particular employer worksite, when served at the worksite.
22 The order shall remain in effect until the secretary issues an
23 order releasing the stop-work order or upon finding that the
24 employer has properly classified the individual as an employee.
25 The employer shall file with the department periodic reports for
26 a probationary period that shall not exceed two years that
27 demonstrate the employer's continued compliance with this
28 section. The department shall promulgate rules and regulations
29 to determine filing times and report requirements.

30 (b) Applicability of orders.--Stop-work orders under

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

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

10 (d) Additional penalty.--In addition to any other penalties
11 provided for in this section, the secretary may assess against
12 any employer a penalty of \$5,000 for each individual whom that
13 employer failed to properly classify as an employee under
14 section 5(a).

15 Section 9. Procedure.

16 (a) Hearings.--Actions taken under sections 7 and 8 are
17 subject to the right of notice and adjudication and the right of
18 appeal in accordance with the provisions of 2 Pa.C.S. (relating
19 to administrative law and procedure).

20 (b) Subpoena powers.--The department has the power to
21 subpoena witnesses, administer oaths, examine witnesses and take
22 testimony or compel the production of documents. Upon
23 application of an attorney for the Commonwealth, the department
24 may issue a subpoena to compel the production of the documents,
25 computer records and information relating to compliance with the
26 act.

27 Section 10. Commonwealth Court.

28 The secretary may seek enforcement of any order or subpoena
29 in the Commonwealth Court.

30 Section 11. Certain agreement prohibited.

1 No person shall require or request that an individual enter
2 into an agreement or sign a document which results in the
3 misclassification of the individual as an independent contractor
4 or otherwise does not accurately reflect the relationship with
5 the employer.

6 Section 12. Retaliation for action prohibited.

7 It shall be unlawful for an employer or any other party to
8 discriminate in any manner or take adverse action against any
9 person in retaliation for exercising rights protected under this
10 act. Rights protected under this act include, but are not
11 limited to, the right to file a complaint or inform any person
12 about an employer's noncompliance with this act and the right to
13 inform any person of the person's potential rights and to assist
14 the person in asserting those rights. Any person who in good
15 faith alleges noncompliance with this act shall be afforded the
16 rights provided by this act, notwithstanding the person's
17 failure to prevail on the merits. Taking adverse action against
18 a person within 90 days of the person's exercise of rights
19 protected under this act shall raise a rebuttable presumption of
20 having done so in retaliation for the exercise of those rights.

21 Section 13. Use of penalty funds.

22 Any sum collected as a penalty pursuant to this act shall be
23 applied toward enforcement and administration costs of the
24 department.

25 Section 14. Rules and regulations.

26 The department may promulgate rules and regulations necessary
27 to implement this act.

28 Section 15. Effective date.

29 This act shall take effect July 1, 2008, or in 60 days,
30 whichever is later.