

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2400 Session of 2008

INTRODUCED BY LENTZ, BELFANTI, GERBER, DIGIROLAMO, W. KELLER, McCALL, EACHUS, CAPPELLI, MUSTIO, 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, J. WHITE AND PERZEL, APRIL 3, 2008

AS REPORTED FROM COMMITTEE ON LABOR RELATIONS, HOUSE OF REPRESENTATIVES, AS AMENDED, MAY 13, 2008

AN ACT

1 Providing for the ~~proper classification of employees for certain~~ <—  
2 ~~purposes~~ CRITERIA FOR INDEPENDENT CONTRACTORS IN THE <—  
3 CONSTRUCTION INDUSTRY; and imposing penalties.

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

6 Section 1. Short title.

7 This act shall be known and may be cited as the ~~Employee~~ <—  
8 ~~Misclassification Prevention~~ CONSTRUCTION INDUSTRY INDEPENDENT <—  
9 CONTRACTOR Act.

10 Section 2. Legislative intent.

11 ~~The General Assembly finds that employers who improperly~~ <—  
12 ~~classify employees as independent contractors deprive these~~  
13 ~~workers of benefits, while reducing the employers' Federal and~~  
14 ~~State tax withholdings and related obligations. This practice~~

1 ~~puts businesses who comply with applicable law at a competitive~~  
2 ~~disadvantage with those that do not follow the law.~~ THE GENERAL <—  
3 ASSEMBLY FINDS THAT INCREASINGLY EMPLOYERS IN THE CONSTRUCTION  
4 INDUSTRY ARE IMPROPERLY CLASSIFYING EMPLOYEES AS INDEPENDENT  
5 CONTRACTORS OR PAYING UNREPORTED COMPENSATION IN ORDER TO EVADE  
6 COMPLIANCE WITH FEDERAL AND STATE LAWS. THESE ACTIONS DEPRIVE  
7 THESE WORKERS OF SOCIAL SECURITY BENEFITS AND OTHER BENEFITS,  
8 WHILE REDUCING THE EMPLOYERS' FEDERAL AND STATE TAX WITHHOLDINGS  
9 AND RELATED OBLIGATIONS. THESE PRACTICES PUT EMPLOYERS THAT BEAR  
10 HIGHER BUSINESS COSTS FOR COMPLYING WITH APPLICABLE LAW AT A  
11 COMPETITIVE DISADVANTAGE WITH THOSE WHO DO NOT FOLLOW THE LAW.  
12 IN ORDER TO RESTRICT AND ELIMINATE THESE ACTIONS THE GENERAL  
13 ASSEMBLY SEES THE NEED TO ENACT LEGISLATION TO SPECIFICALLY  
14 ADDRESS THESE ISSUES.

15 Section 3. Definitions.

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

19 "CONSTRUCTION." CONSTRUCTION, RECONSTRUCTION, DEMOLITION, <—  
20 ALTERATION, MODIFICATION, ERECTION, CUSTOM FABRICATION, REPAIR  
21 WORK OR MAINTENANCE WORK DONE ON ANY PROPERTY OR PREMISES UNDER  
22 CONTRACT, WHETHER OR NOT THE WORK IS FOR A PUBLIC BODY AND PAID  
23 FOR FROM PUBLIC FUNDS.

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

26 "Employer." The term includes any individual, partnership,  
27 association, joint stock company, corporation, business trust or  
28 any other person or groups of persons acting directly or  
29 indirectly in the interest of an employer in relation to an  
30 employee AND WHO IS ENGAGING IN OR PERFORMING SERVICES IN THE <—

1 COMMERCIAL OR RESIDENTIAL BUILDING CONSTRUCTION INDUSTRY FOR  
2 REMUNERATION.

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

5 ~~Section 4. Performance of services.~~ <—

6 ~~(a) Applicability. Services performed by an individual for~~  
7 ~~wages shall be deemed to be employment subject to this act, and~~  
8 ~~the individual shall be considered an employee of the party that~~  
9 ~~pays the wages, unless and until it is shown to the satisfaction~~  
10 ~~of the department that:~~

11 ~~(1) the individual has been and will continue to be free~~  
12 ~~from direction and control of the employer, both under~~  
13 ~~contract of service and in fact;~~

14 ~~(2) the service is outside the usual course of the~~  
15 ~~individual's business of the employer; and~~

16 ~~(3) the individual is customarily engaged in an~~  
17 ~~independently established trade, occupation, profession or~~  
18 ~~business.~~

19 ~~(b) Factor not to be considered. The failure to withhold~~  
20 ~~Federal or State income taxes or to pay unemployment~~  
21 ~~compensation contributions or workers' compensation premiums~~  
22 ~~with respect to an individual's wages shall not be considered in~~  
23 ~~making a determination under this section.~~

24 SECTION 4. CERTAIN SERVICES DEEMED EMPLOYMENT AND EXCEPTIONS. <—

25 (A) GENERAL RULE.--FOR PURPOSES OF THIS ACT, AN INDIVIDUAL  
26 ENGAGING IN OR PERFORMING SERVICES IN THE COMMERCIAL OR  
27 RESIDENTIAL BUILDING CONSTRUCTION INDUSTRY FOR REMUNERATION IS  
28 PRESUMED TO BE AN EMPLOYEE UNLESS:

29 (1) THE INDIVIDUAL CAN DEMONSTRATE BY SUBSTANTIAL  
30 CREDIBLE EVIDENCE THAT THE INDIVIDUAL IS FREE FROM CONTROL OR

1 DIRECTION OVER PERFORMANCE OF SUCH SERVICES BOTH UNDER THE  
2 CONTRACT OF SERVICE AND IN FACT; AND

3 (2) AS TO SUCH SERVICES, THE INDIVIDUAL IS CUSTOMARILY  
4 ENGAGED IN AN INDEPENDENTLY ESTABLISHED TRADE, OCCUPATION,  
5 PROFESSION OR BUSINESS.

6 (B) INDEPENDENT CONTRACTOR CRITERIA.--AN INDIVIDUAL ENGAGING  
7 IN OR PERFORMING SERVICES IN THE COMMERCIAL OR RESIDENTIAL  
8 BUILDING CONSTRUCTION INDUSTRY FOR REMUNERATION SHALL BE DEEMED  
9 AN INDEPENDENT CONTRACTOR IF THE INDIVIDUAL CAN DEMONSTRATE, BY  
10 CREDIBLE EVIDENCE, THAT THE INDIVIDUAL MEETS ALL OF THE  
11 FOLLOWING CRITERIA:

12 (1) MAINTAINS A SEPARATE BUSINESS LOCATION THAT IS  
13 SEPARATE FROM THE LOCATION OF THE PERSON OR ENTITY FOR WHOM  
14 SERVICES ARE BEING PERFORMED, WITH THE INDIVIDUAL'S OWN  
15 OFFICE, AND OPERATES WITH OWNED OR LEASED EQUIPMENT AND OTHER  
16 FACILITIES. FOR PURPOSES OF THIS PARAGRAPH, AN OFFICE MAY BE  
17 MAINTAINED IN THE INDIVIDUAL'S RESIDENCE IF THE INDIVIDUAL IS  
18 LICENSED TO PERFORM THE SPECIFIC KIND AND QUALITY OF WORK  
19 REQUIRED BY THE CONTRACTS SPECIFIED IN THIS SUBSECTION BY ALL  
20 STATE AND LOCAL LICENSING AUTHORITIES.

21 (2) OPERATES UNDER CONTRACTS WHICH ARE IN WRITING AND  
22 WHICH CONTRACTS ARTICULATE PLAINLY THE PRECISE TERMS OF  
23 PAYMENT FOR WORK PERFORMED, THE SCOPE OF WORK TO BE PERFORMED  
24 AND A SPECIFIC PROHIBITION ON THE RETENTION BY THE  
25 INDEPENDENT CONTRACTOR OF ANY OTHER INDEPENDENT CONTRACTOR TO  
26 PERFORM ANY PART OF THE WORK DESCRIBED IN THE CONTRACT.

27 (3) INCLUDES SERVICES RENDERED ON A FEDERAL INCOME TAX  
28 SCHEDULE AS AN INDEPENDENT BUSINESS OR PROFESSION.

29 (4) INCURS THE MAIN EXPENSES RELATED TO THE WORK.

30 (5) IS RESPONSIBLE FOR THE SATISFACTORY COMPLETION OF

1 THE WORK AND IS LIABLE FOR A FAILURE TO COMPLETE THE WORK.

2 (6) REALIZES A PROFIT OR LOSS UNDER CONTRACTS TO PERFORM  
3 WORK.

4 (7) THE SUCCESS OR FAILURE OF THE INDIVIDUAL'S BUSINESS  
5 DEPENDS ON THE RELATIONSHIP OF BUSINESS RECEIPTS TO  
6 EXPENDITURES.

7 (8) HAS THROUGH OWNERSHIP, OR A WRITTEN AND EXECUTED  
8 LEASING ARRANGEMENT, THE TOOLS, EQUIPMENT AND OTHER ASSETS  
9 NECESSARY TO PERFORM THE SERVICES.

10 (9) MAKES SERVICES AVAILABLE TO OTHER BUSINESSES,  
11 GOVERNMENTAL AGENCIES IN THIS COMMONWEALTH OR TO THE GENERAL  
12 PUBLIC THROUGH BUSINESS ADVERTISING, SOLICITATION OR OTHER  
13 MARKETING EFFORTS REASONABLY CALCULATED TO OBTAIN NEW  
14 CONTRACTS TO PROVIDE SIMILAR SERVICES.

15 (10) HAS CONTINUING OR RECURRING BUSINESS LIABILITIES OR  
16 OBLIGATIONS.

17 (11) PERFORMS THE SERVICES THROUGH A BUSINESS IN WHICH  
18 THE INDIVIDUAL HAS A PRINCIPAL PROPRIETARY INTEREST.

19 (12) IS A UNITED STATES CITIZEN OR IS AUTHORIZED UNDER  
20 FEDERAL LAW TO WORK IN THE UNITED STATES, AS DEFINED UNDER  
21 SECTION 274A OF THE IMMIGRATION AND NATIONALITY ACT (66 STAT.  
22 163, 8 U.S.C. § 1324A).

23 (C) FACTOR NOT TO BE CONSIDERED.--THE FAILURE TO WITHHOLD  
24 FEDERAL OR STATE INCOME TAXES OR PAY UNEMPLOYMENT COMPENSATION  
25 TAXES WITH RESPECT TO AN INDIVIDUAL'S REMUNERATION SHALL NOT BE  
26 CONSIDERED IN DETERMINING WHETHER THE INDIVIDUAL IS AN  
27 INDEPENDENT CONTRACTOR FOR PURPOSES OF THE ACT OF JUNE 2, 1915  
28 (P.L.736, NO.338), KNOWN AS THE WORKERS' COMPENSATION ACT, OR  
29 THE ACT OF DECEMBER 5, 1936 (2ND SP.SESS., 1937 P.L.2897, NO.1),  
30 KNOWN AS THE UNEMPLOYMENT COMPENSATION LAW.

1 (D) CONSTRUCTION.--FOR PURPOSES OF THIS SECTION, EACH  
2 EMPLOYMENT RELATIONSHIP SHALL BE CONSIDERED SEPARATELY.

3 Section 5. Improper classification of employees.

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

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

20 (C) CONSPIRACY BY OTHER PARTIES.--A PARTY THAT DOES NOT MEET <—  
21 THE DEFINITION OF "EMPLOYER" IN SECTION 3, BUT WHICH CONTRACTS  
22 WITH AN EMPLOYER KNOWING THE EMPLOYER INTENDS TO MISCLASSIFY  
23 EMPLOYEES IN VIOLATION OF THIS ACT SHALL BE SUBJECT TO THE SAME  
24 PENALTIES, REMEDIES OR OTHER ACTIONS AS THE EMPLOYER FOUND TO BE  
25 IN VIOLATION OF THIS ACT.

26 Section 6. Criminal penalties.

27 (a) Knowing violation.--An employer, or an officer or agent  
28 of the employer, that knowingly violates section 5(a) commits a  
29 felony of the third degree and shall, upon ~~conviction, be~~ <—  
30 ~~sentenced to pay a fine of not more than \$15,000 or to~~

1 ~~imprisonment for not more than three and one half years for a~~  
2 ~~first offense, or both, and to pay a fine of not more than~~  
3 ~~\$30,000 or to imprisonment for not more than seven years, or~~  
4 ~~both, for a subsequent offense.~~ CONVICTION: <—

5 (1) BE SENTENCED TO PAY A FINE OF NOT MORE THAN \$15,000  
6 OR IMPRISONMENT FOR NOT MORE THAN THREE AND ONE-HALF YEARS,  
7 OR BOTH, FOR A FIRST OFFENSE;

8 (2) BE SENTENCED TO PAY A FINE OF NOT MORE THAN \$30,000  
9 OR IMPRISONMENT FOR NOT MORE THAN SEVEN YEARS, OR BOTH, FOR A  
10 SUBSEQUENT OFFENSE; AND

11 (3) MAY BE SUBJECT TO A STOP-WORK ORDER, AS DETERMINED  
12 BY THE SECRETARY PURSUANT TO SECTION 8.

13 (b) Unintentional violation.--An employer, or an officer or  
14 agent of the employer, that unintentionally violates section  
15 5(a) commits a misdemeanor of the third degree and shall, upon  
16 conviction, be sentenced to pay a fine of not more than \$2,500  
17 ~~or to imprisonment for not more than 180 days for a first~~ <—  
18 ~~offense, or both, and to pay a fine of not more than \$5,000 or~~  
19 ~~to imprisonment for not more than one year, or both, for a~~  
20 ~~subsequent offense.~~ FOR A FIRST OFFENSE. A PRIOR OCCURRENCE <—  
21 SHALL BE DEEMED TO BE CLEAR AND CONVINCING EVIDENCE OF INTENTION  
22 WITH RESPECT TO ANY SUBSEQUENT VIOLATION.

23 Section 7. Civil actions and remedies.

24 (a) Debarment.--If the secretary determines, after notice  
25 and hearing, that an employer, or an officer or agent of the  
26 employer, has KNOWINGLY failed to properly classify an <—  
27 individual as an employee or failed to pay required benefits or  
28 other contributions as required in section 5, or upon the  
29 conviction for a violation of this act, the secretary shall  
30 notify all public bodies in this Commonwealth of the name of the

1 employer, and no contract shall be awarded to the employer or to  
2 any firm, corporation or partnership in which the employer has  
3 an interest until a period of up to three years, as determined  
4 by the secretary, has elapsed from the date of the notice.

5 (b) Administrative penalties.--As an alternative to or in  
6 addition to any other sanctions provided by law for a violation  
7 of this act, when the secretary finds that an employer has  
8 violated this act, the secretary is authorized to assess and  
9 collect administrative penalties up to a maximum of \$2,500 for  
10 the first violation and up to a maximum of \$5,000 for each  
11 subsequent violation. When determining the amount of the penalty  
12 imposed because of a violation, the secretary shall consider  
13 factors which include the history of previous violations by the  
14 employer, the seriousness of the violation, the good faith of  
15 the employer and the size of the employer's business. Each  
16 employee misclassified by the employer shall constitute a  
17 separate offense.

18 (c) Actions by employees.--An individual who has not been  
19 properly classified as an employee may bring a civil action for  
20 damages against the employer for KNOWINGLY failing to properly <—  
21 classify the employee ~~if the employer had knowledge of the~~ <—  
22 ~~misclassification~~. An individual's representative, including a  
23 labor organization, may bring the action on behalf of the  
24 individual or as a class action. The court may award attorney  
25 fees and other costs of the action in addition to damages to an  
26 individual or class of individuals who have not been properly  
27 classified as employees in violation of section 5(a).

28 Section 8. Stop-work orders.

29 (a) Issuance of order.--If the secretary determines, after  
30 notice and hearing, that an employer, OR OFFICER OR AGENT OF THE <—



1 EMPLOYER, HAS KNOWINGLY failed to properly classify an  
2 individual as an employee ~~or has failed to pay required benefits~~ <—  
3 ~~or other contributions as required in~~ UNDER section 5, the <—  
4 secretary ~~shall~~ MAY issue a stop-work order requiring the <—  
5 cessation of all business operations within 72 hours of the  
6 determination. The order shall take effect when served upon the  
7 employer or, for a particular employer worksite, when served at  
8 the worksite. The order shall remain in effect until the  
9 secretary issues an order releasing the stop-work order or upon  
10 finding that the employer has properly classified the individual  
11 as an employee. The employer shall file with the department  
12 periodic reports for a probationary period that shall not exceed  
13 two years that demonstrate the employer's continued compliance  
14 with this section. The department shall promulgate rules and  
15 regulations to determine filing times and report requirements.

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

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

26 ~~(d) Additional penalty. In addition to any other penalties~~ <—  
27 ~~provided for in this section, the secretary may assess against~~  
28 ~~any employer a penalty of \$5,000 for each individual whom that~~  
29 ~~employer failed to properly classify as an employee under~~  
30 ~~section 5(a).~~

1 Section 9. Procedure.

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

6 (b) Subpoena powers.--The department has the power to  
7 subpoena witnesses, administer oaths, examine witnesses and take  
8 testimony or compel the production of documents. Upon  
9 application of an attorney for the Commonwealth, the department  
10 may issue a subpoena to compel the production of the documents,  
11 computer records and information relating to compliance with the  
12 act.

13 Section 10. Commonwealth Court.

14 The secretary may seek enforcement of any order or subpoena  
15 in the Commonwealth Court.

16 Section 11. Certain agreement prohibited.

17 No person shall require or request that an individual enter  
18 into an agreement or sign a document which results in the  
19 misclassification of the individual as an independent contractor  
20 or otherwise does not accurately reflect the relationship with  
21 the employer.

22 Section 12. Retaliation for action prohibited.

23 It shall be unlawful for an employer or any other party to  
24 discriminate in any manner or take adverse action against any  
25 person in retaliation for exercising rights protected under this  
26 act. Rights protected under this act include, but are not  
27 limited to, the right to file a complaint or inform any person  
28 about an employer's noncompliance with this act and the right to  
29 inform any person of the person's potential rights and to assist  
30 the person in asserting those rights. Any person who in good

1 faith alleges noncompliance with this act shall be afforded the  
2 rights provided by this act, notwithstanding the person's  
3 failure to prevail on the merits. Taking adverse action against  
4 a person within 90 days of the person's exercise of rights  
5 protected under this act shall raise a rebuttable presumption of  
6 having done so in retaliation for the exercise of those rights.

7 Section 13. Use of penalty funds.

8 Any ~~sum collected as a penalty~~ ASSESSMENTS AND PENALTIES ←  
9 COLLECTED pursuant to this act shall be applied toward  
10 IMPLEMENTATION, enforcement and administration costs ~~of~~ INCURRED ←  
11 BY the department UNDER THIS ACT. HOWEVER, THE SECRETARY MAY ←  
12 TRANSFER AN AGREED-TO AMOUNT OF MONEYS COLLECTED TO THE ATTORNEY  
13 GENERAL TO ASSIST IN THE ENFORCEMENT OF THIS ACT.

14 Section 14. Rules and regulations.

15 The department may promulgate rules and regulations necessary  
16 to implement this act.

17 SECTION 15. ANNUAL REPORT REQUIRED. ←

18 THE DEPARTMENT SHALL SUBMIT AN ANNUAL REPORT TO THE GENERAL  
19 ASSEMBLY BY MARCH 1 OF THE YEAR FOLLOWING THE FIRST FULL YEAR IN  
20 WHICH THIS ACT IS IN EFFECT, AND EACH YEAR THEREAFTER,  
21 DETAILING, TO THE MAXIMUM EXTENT POSSIBLE, DATA ON THE PREVIOUS  
22 CALENDAR YEAR'S ADMINISTRATION AND ENFORCEMENT OF THIS ACT. THE  
23 DEPARTMENT MAY INCLUDE ANY RELEVANT FACTS AND STATISTICS THAT IT  
24 BELIEVES NECESSARY INTO THE CONTENT OF THE REPORT.

25 Section ~~15~~ 16. Effective date. ←

26 This act shall take effect ~~July 1, 2008, or in 60~~ JANUARY 1, ←  
27 2009, OR IN 90 days, whichever is later.