

## 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 AMENDED ON SECOND CONSIDERATION, HOUSE OF REPRESENTATIVES,  
JUNE 3, 2008

---

## AN ACT

1 Providing for the criteria for independent contractors in the  
2 construction industry; 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 Construction  
7 Industry Independent Contractor Act.

8 Section 2. Legislative intent.

9 The General Assembly finds that increasingly employers in the  
10 construction industry are improperly classifying employees as  
11 independent contractors or paying unreported compensation in  
12 order to evade compliance with Federal and State laws. These  
13 actions deprive these workers of Social Security benefits and

1 other benefits, INCLUDING OVERTIME PAY, while reducing the <—  
2 employers' Federal and State tax withholdings and related  
3 obligations. These practices put employers that bear higher  
4 business costs for complying with applicable law at a  
5 competitive disadvantage with those who do not follow the law.  
6 In order to restrict and eliminate these actions the General  
7 Assembly sees the need to enact legislation to specifically  
8 address these issues.

9 Section 3. Definitions.

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

13 "Construction." Construction, reconstruction, demolition,  
14 alteration, modification, erection, custom fabrication, repair  
15 work or maintenance work done on any REAL property or premises <—  
16 under contract, whether or not the work is for a public body and  
17 paid for from public funds.

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

20 "Employer." The term includes any individual, partnership,  
21 association, joint stock company, corporation, business trust or  
22 any other person or groups of persons acting directly or  
23 indirectly in the interest of an employer in relation to an  
24 employee and who is engaging in or performing services in the  
25 commercial or residential building construction industry for  
26 remuneration.

27 "MINIMUM WAGE ACT." THE ACT OF JANUARY 17, 1968 (P.L.11, <—  
28 NO.5), KNOWN AS THE MINIMUM WAGE ACT OF 1968.

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

1 "WORKERS' COMPENSATION ACT." THE ACT OF JUNE 2, 1915 ←  
2 (P.L.736, NO.338), KNOWN AS THE WORKERS' COMPENSATION ACT.

3 "UNEMPLOYMENT COMPENSATION LAW." THE ACT OF DECEMBER 5, 1936  
4 (2ND SP.SESS., 1937 P.L.2897, NO.1), KNOWN AS THE UNEMPLOYMENT  
5 COMPENSATION LAW.

6 "WAGE PAYMENT AND COLLECTION LAW." THE ACT OF JULY 14, 1961  
7 (P.L.637, NO.329), KNOWN AS THE WAGE PAYMENT AND COLLECTION LAW.  
8 Section 4. Certain services deemed employment and exceptions.

9 (a) General rule.--For purposes of ~~this act~~, THE MINIMUM ←  
10 WAGE ACT, THE WAGE PAYMENT AND COLLECTION LAW, THE UNEMPLOYMENT  
11 COMPENSATION LAW AND THE WORKERS' COMPENSATION ACT, an  
12 individual engaging in or performing services in the commercial  
13 or residential building construction industry for remuneration  
14 is presumed to be an employee unless:

15 (1) the individual ~~can demonstrate by substantial~~ ←  
16 ~~credible evidence that the individual is~~ HAS BEEN AND WILL ←  
17 CONTINUE TO BE free from control or direction over  
18 performance of such services both under the contract of  
19 service and in fact; and

20 (2) as to such services, the individual is customarily  
21 engaged in an independently established trade, occupation,  
22 profession or business.

23 (b) Independent contractor criteria.--An individual engaging  
24 in or performing services in the commercial or residential  
25 building construction industry for remuneration shall be deemed  
26 an independent contractor if the individual can demonstrate, by  
27 credible evidence, that the individual meets all of the  
28 following criteria:

29 (1) Maintains a separate business location that is  
30 separate from the location of the person or entity for whom

1 services are being performed, with the individual's own  
2 office, and operates with owned or leased equipment and other  
3 facilities. For purposes of this paragraph, an office may be  
4 maintained in the individual's residence if the individual is  
5 licensed to perform the specific kind and quality of work  
6 required by the contracts specified in this subsection by all  
7 State and local licensing authorities.

8 (2) Operates under contracts which are in writing and  
9 which contracts articulate plainly the precise terms of  
10 payment for work performed, the scope of work to be performed  
11 and a specific prohibition on the retention by the  
12 independent contractor of any other independent contractor to  
13 perform any part of the work described in the contract.

14 (3) Includes INCOME AND LOSSES FROM services rendered on <—  
15 a Federal income tax schedule as an independent business or  
16 profession.

17 (4) Incurs the main expenses related to the work.

18 (5) Is responsible for the satisfactory completion of  
19 the work and is liable for a failure to complete the work.

20 (6) Realizes a profit or loss under contracts to perform  
21 work.

22 (7) The success or failure of the individual's business  
23 depends on the relationship of business receipts to  
24 expenditures.

25 (8) Has through ownership, or a written and executed  
26 leasing arrangement WITH A PERSON OTHER THAN THE EMPLOYER, <—  
27 the tools, equipment and other assets necessary to perform  
28 the services.

29 (9) Makes services available to other businesses,  
30 governmental agencies in this Commonwealth or to the general

1 public through business advertising, solicitation or other  
2 marketing efforts reasonably calculated to obtain new  
3 contracts to provide similar services.

4 (10) Has continuing or recurring business liabilities or  
5 obligations.

6 (11) Performs the services through a business in which  
7 the individual has a principal proprietary interest.

8 (12) Is a United States citizen or is authorized under  
9 Federal law to work in the United States, as defined under  
10 section 274A of the Immigration and Nationality Act (66 Stat.  
11 163, 8 U.S.C. § 1324a).

12 (c) Factor not to be considered.--The failure to withhold  
13 Federal or State income taxes or pay unemployment compensation  
14 taxes with respect to an individual's remuneration shall not be  
15 considered in determining whether the individual is an  
16 independent contractor for purposes of the act of June 2, 1915 <—  
17 (~~P.L. 736, No. 338~~), known as the Workers' Compensation Act, or  
18 the act of December 5, 1936 (2nd Sp. Sess., 1937 P.L. 2897, No. 1),  
19 known as the Unemployment Compensation Law. UNEMPLOYMENT <—  
20 COMPENSATION LAW OR THE WORKERS' COMPENSATION ACT.

21 (d) Construction.--For purposes of this section, each  
22 employment relationship shall be considered separately.

23 Section 5. Improper classification of employees.

24 ~~(a) Violation. An employer, or an officer or agent of the <—~~  
25 employer, that fails to properly classify an individual as an  
26 employee in accordance with section 4 shall be subject to the  
27 penalties, remedies or actions contained in this act.

28 (A) OFFENSE DEFINED.--AN EMPLOYER, OR OFFICER OR AGENT OF AN <—  
29 EMPLOYER, COMMITS A VIOLATION OF THIS ACT IF THE EMPLOYER,  
30 OFFICER OR AGENT FAILS TO PROPERLY CLASSIFY THE INDIVIDUAL AS AN

1 EMPLOYEE WITH THE INTENT OF EVADING THE REQUIREMENTS OF THE  
2 MINIMUM WAGE ACT, THE WAGE PAYMENT AND COLLECTION LAW, THE  
3 UNEMPLOYMENT COMPENSATION LAW OR THE WORKERS' COMPENSATION ACT  
4 AND SHALL BE SUBJECT TO THE PENALTIES, REMEDIES OR ACTIONS  
5 CONTAINED IN THIS ACT.

6 (b) Enforcement.--When the secretary finds that an employer  
7 has violated a provision of this act, the secretary may refer  
8 the matter to the Office of Attorney General for investigation  
9 and prosecution. Nothing in this act shall be deemed to limit  
10 the authority of the Attorney General to investigate and  
11 prosecute violations of this act.

12 (c) Conspiracy by other parties.--A party that does not meet  
13 the definition of "employer" in section 3, but which contracts  
14 with an employer knowing the employer intends to misclassify  
15 employees in violation of this act shall be subject to the same  
16 penalties, remedies or other actions as the employer found to be  
17 in violation of this act.

18 Section 6. Criminal penalties.

19 ~~(a) Knowing violation. An employer, or an officer or agent~~ <—

20 (A) KNOWING VIOLATION.-- <—

21 (1) AN EMPLOYER, OR OFFICER OR AGENT of the employer,  
22 that knowingly violates section 5(a) commits a felony of the  
23 third degree and shall, upon conviction:

24 ~~(1) be sentenced to pay a fine of not more than \$15,000~~ <—  
25 ~~or imprisonment for not more than three and one half years,~~  
26 ~~or both, for a first offense;~~

27 ~~(2) be sentenced to pay a fine of not more than \$30,000~~  
28 ~~or imprisonment for not more than seven years, or both, for a~~  
29 ~~subsequent offense; and~~

30 ~~(3) may be subject to a stop work order, as determined~~

1 ~~by the secretary pursuant to section 8.~~

2 ~~(b) Unintentional violation. An employer, or an officer or~~  
3 ~~agent of the employer, that unintentionally violates section~~  
4 ~~5(a) commits a misdemeanor of the third degree and shall, upon~~  
5 ~~conviction, be sentenced to pay a fine of not more than \$2,500~~  
6 ~~for a first offense. A prior occurrence shall be deemed to be~~  
7 ~~clear and convincing evidence of intention with respect to any~~  
8 ~~subsequent violation.~~

9 (I) BE SENTENCED TO PAY A FINE OF NOT MORE THAN <—  
10 \$15,000 OR IMPRISONMENT FOR NOT MORE THAN THREE AND ONE-  
11 HALF YEARS, OR BOTH, FOR A FIRST OFFENSE; AND

12 (II) BE SENTENCED TO PAY A FINE OF NOT MORE THAN  
13 \$30,000 OR IMPRISONMENT FOR NOT MORE THAN SEVEN YEARS, OR  
14 BOTH, FOR A SUBSEQUENT OFFENSE.

15 (2) AN EMPLOYER, OR OFFICER OR AGENT OF THE EMPLOYER,  
16 THAT, AFTER BEING SENTENCED UNDER PARAGRAPH (1)(I), KNOWINGLY  
17 VIOLATES SECTION 5(A) MAY BE SUBJECT TO A STOP-WORK ORDER, AS  
18 DETERMINED BY THE SECRETARY PURSUANT TO SECTION 8.

19 (B) SUMMARY OFFENSE.--AN EMPLOYER, OR OFFICER OR AGENT OF  
20 THE EMPLOYER, THAT NEGLIGENTLY FAILS TO PROPERLY CLASSIFY AN  
21 INDIVIDUAL AS AN EMPLOYEE UNDER SECTION 5(A) COMMITS A SUMMARY  
22 OFFENSE AND SHALL, UPON CONVICTION, BE SENTENCED TO PAY A FINE  
23 OF NOT MORE THAN \$1,000. EVIDENCE OF A PRIOR CONVICTION UNDER  
24 THIS SUBSECTION SHALL BE ADMISSIBLE AS EVIDENCE OF KNOWLEDGE  
25 UNDER SUBSECTION (A).

26 Section 7. Civil actions and remedies.

27 ~~(a) Debarment. If the secretary determines, after notice <—~~  
28 ~~and hearing, that an employer, or an officer or agent of the~~  
29 ~~employer, has knowingly failed to properly classify an~~  
30 ~~individual as an employee or failed to pay required benefits or~~

1 ~~other contributions as required in section 5, or upon the~~  
2 ~~conviction for a violation of this act, the~~

3 (A) DEBARMENT AND ORDER TO SHOW CAUSE.--IF THE SECRETARY ←—  
4 RECEIVES INFORMATION INDICATING THAT AN EMPLOYER, OR OFFICER OR  
5 AGENT OF THE EMPLOYER, HAS KNOWINGLY AND INTENTIONALLY VIOLATED  
6 THIS ACT, OR HAS BEEN CONVICTED OF A VIOLATION OF THIS ACT, THE  
7 SECRETARY SHALL ISSUE AN ORDER TO SHOW CAUSE WHY THE INDIVIDUAL  
8 SHOULD NOT BE FOUND IN VIOLATION OF THIS ACT AND SUBJECT TO  
9 DEBARMENT. AN INDIVIDUAL SERVED WITH AN ORDER TO SHOW CAUSE  
10 SHALL HAVE A PERIOD OF 20 DAYS FROM THE DATE THE ORDER IS SERVED  
11 TO FILE AN ANSWER IN WRITING. IF THE INDIVIDUAL FAILS TO FILE A  
12 TIMELY AND ADEQUATE ANSWER TO THE ORDER TO SHOW CAUSE, THE  
13 SECRETARY SHALL ISSUE AN IMMEDIATE DEBARMENT OR IMMEDIATELY  
14 ASSESS PENALTIES AS PROVIDED IN THIS SECTION, OR BOTH. THE  
15 secretary shall notify all public bodies in this Commonwealth of  
16 the name of the employer, and no contract shall be awarded to  
17 the employer or to any firm, corporation or partnership in which  
18 the employer has an interest until a period of up to three  
19 years, as determined by the secretary, has elapsed from the date  
20 of the notice.

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



1 the employer and the size of the employer's business. Each  
2 employee misclassified by the employer shall constitute a  
3 separate offense.

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

14 Section 8. Stop-work orders.

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

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

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

11 Section 9. Procedure.

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

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

23 Section 10. Commonwealth Court.

24 The secretary may seek enforcement of any order or subpoena  
25 in the Commonwealth Court.

26 Section 11. Certain agreement prohibited.

27 No person shall require or request that an individual enter  
28 into an agreement or sign a document which results in the  
29 misclassification of the individual as an independent contractor  
30 or otherwise does not accurately reflect the relationship with

1 the employer.

2 Section 12. Retaliation for action prohibited.

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

17 Section 13. Use of penalty funds.

18 Any assessments and penalties collected pursuant to this act  
19 shall be applied toward implementation, enforcement and  
20 administration costs incurred by the department under this act.  
21 However, the secretary may transfer an agreed-to amount of  
22 moneys collected to the Attorney General to assist in the  
23 enforcement of this act.

24 Section 14. Rules and regulations.

25 The department may promulgate rules and regulations necessary  
26 to implement AND ADMINISTER this act. ←

27 Section 15. Annual report required.

28 The department shall submit an annual report to the General  
29 Assembly by March 1 of the year following the first full year in  
30 which this act is in effect, and each year thereafter,

1 detailing, to the maximum extent possible, data on the previous  
2 calendar year's administration and enforcement of this act. The  
3 department may include any relevant facts and statistics that it  
4 believes necessary into the content of the report.

5 SECTION 16. APPLICABILITY. ←

6 THIS ACT SHALL NOT BE CONSTRUED TO BRING AN INDIVIDUAL WITHIN  
7 THE SCOPE OF THE UNEMPLOYMENT COMPENSATION LAW OR THE WORKERS'  
8 COMPENSATION ACT IF THE INDIVIDUAL IS EXCLUDED FROM THE SCOPE OF  
9 THE APPROPRIATE STATUTE.

10 SECTION 17. SEVERABILITY.

11 THE PROVISIONS OF THIS ACT ARE SEVERABLE. IF ANY PROVISION OF  
12 THIS ACT OR ITS APPLICATION TO ANY INDIVIDUAL OR CIRCUMSTANCE IS  
13 HELD INVALID, THE INVALIDITY SHALL NOT AFFECT OTHER PROVISIONS  
14 OR APPLICATIONS OF THIS ACT WHICH CAN BE GIVEN EFFECT WITHOUT  
15 THE INVALID PROVISION OR APPLICATION.

16 SECTION 18. CONSTRUCTION OF LAW.

17 NOTHING CONTAINED IN THIS ACT SHALL BE CONSTRUED TO IMPAIR OR  
18 AFFECT IN ANY MANNER THE ABILITY OF THE DEPARTMENT TO CARRY OUT  
19 THE POWERS AND DUTIES PRESCRIBED BY THE LAWS OF THIS  
20 COMMONWEALTH OR TO ADOPT MEASURES TO IMPROVE THE ENFORCEMENT OF  
21 OTHER LAWS OF THIS COMMONWEALTH.

22 Section ~~16~~ 19. Effective date. ←

23 This act shall take effect January 1, 2009, or in 90 days,  
24 whichever is later.