

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL**No. 2400** Session of
2008

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AS AMENDED ON THIRD CONSIDERATION, HOUSE OF REPRESENTATIVES,
JUNE 9, 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 "Unemployment Compensation Law." The act of December 5, 1936
2 (2nd Sp.Sess., 1937 P.L.2897, No.1), known as the Unemployment
3 Compensation Law.

4 "Wage Payment and Collection Law." The act of July 14, 1961
5 (P.L.637, No.329), known as the Wage Payment and Collection Law.

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

8 Section 4. Certain services deemed employment and exceptions.

9 (a) General rule.--For purposes of the Minimum Wage Act, the
10 Wage Payment and Collection Law, the Unemployment Compensation
11 Law and the Workers' Compensation Act, an individual engaging in
12 or performing services in the commercial or residential building
13 construction industry for remuneration is presumed to be an
14 employee unless:

15 (1) the individual has been and will continue to be free
16 from control or direction over performance of such services
17 both under the contract of service and in fact; and

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

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

27 (1) Maintains a separate business location that is
28 separate from the location of the person or entity for whom
29 services are being performed, with the individual's own
30 office, and operates with owned or leased equipment and other

1 facilities. For purposes of this paragraph, an office may be
2 maintained in the individual's residence if the individual is
3 licensed to perform the specific kind and quality of work
4 required by the contracts specified in this subsection by all
5 State and local licensing authorities.

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

12 (3) Includes income and losses from services rendered on
13 a Federal income tax schedule as an independent business or
14 profession.

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

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

18 (6) Realizes a profit or loss under contracts to perform
19 work.

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

23 (8) Has through ownership, or a written and executed
24 leasing arrangement with a person other than the employer,
25 the tools, equipment and other assets necessary to perform
26 the services.

27 (9) Makes services available to other businesses,
28 governmental agencies in this Commonwealth or to the general
29 public through business advertising, solicitation or other
30 marketing efforts reasonably calculated to obtain new

1 contracts to provide similar services.

2 (10) Has continuing or recurring business liabilities or
3 obligations.

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

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

10 (c) Factor not to be considered.--The failure to withhold
11 Federal or State income taxes or pay unemployment compensation
12 taxes with respect to an individual's remuneration shall not be
13 considered in determining whether the individual is an
14 independent contractor for purposes of the Unemployment
15 Compensation Law or the Workers' Compensation Act.

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

18 Section 5. Improper classification of employees.

19 (a) Offense defined.--An employer, or officer or agent of an
20 employer, commits a violation of this act if the employer,
21 officer or agent fails to properly classify the individual as an
22 employee with the intent of evading the requirements of the
23 Minimum Wage Act, the Wage Payment and Collection Law, the
24 Unemployment Compensation Law or the Workers' Compensation Act
25 and shall be subject to the penalties, remedies or actions
26 contained in this act.

27 (b) Enforcement.--When the secretary finds that an employer
28 has violated a provision of this act, the secretary may refer
29 the matter to the Office of Attorney General for investigation
30 and prosecution. Nothing in this act shall be deemed to limit

1 the authority of the Attorney General to investigate and
2 prosecute violations of this act.

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

9 Section 6. Criminal penalties.

10 (a) Knowing violation.--

11 (1) An employer, or officer or agent of the employer,
12 that knowingly violates section 5(a) commits a felony of the
13 third degree and shall, upon conviction:

14 (i) be sentenced to pay a fine of not more than
15 \$15,000 or imprisonment for not more than three and one-
16 half years, or both, for a first offense; and

17 (ii) be sentenced to pay a fine of not more than
18 \$30,000 or imprisonment for not more than seven years, or
19 both, for a subsequent offense.

20 (2) An employer, or officer or agent of the employer,
21 that, after being sentenced under paragraph (1)(i), knowingly
22 violates section 5(a) may be subject to a stop-work order, as
23 determined by the secretary pursuant to section 8.

24 (b) Summary offense.--An employer, or officer or agent of
25 the employer, that negligently fails to properly classify an
26 individual as an employee under section 5(a) commits a summary
27 offense and shall, upon conviction, be sentenced to pay a fine
28 of not more than \$1,000. Evidence of a prior conviction under
29 this subsection shall be admissible as evidence of knowledge
30 under subsection (a).

1 Section 7. Civil actions and remedies.

2 (a) Debarment and order to show cause.--If the secretary
3 receives information indicating that an employer, or officer or
4 agent of the employer, has knowingly and intentionally violated
5 this act, or has been convicted of a violation of this act, the
6 secretary shall issue an order to show cause why the individual
7 should not be found in violation of this act and subject to
8 debarment. An individual served with an order to show cause
9 shall have a period of 20 days from the date the order is served
10 to file an answer in writing. If the individual fails to file a
11 timely and adequate answer to the order to show cause, the
12 secretary shall issue an immediate debarment or immediately
13 assess penalties as provided in this section, or both. The
14 secretary shall notify all public bodies in this Commonwealth of
15 the name of the employer, and no contract shall be awarded to
16 the employer or to any firm, corporation or partnership in which
17 the employer has an interest until a period of up to three
18 years, as determined by the secretary, has elapsed from the date
19 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 knowingly and intentionally
6 failing to properly classify the employee. An individual's
7 representative, including a labor organization, may bring the
8 action on behalf of the individual or as a class action. The
9 court may award attorney fees and other costs of the action in
10 addition to damages to an individual or class of individuals who
11 have not been properly classified as employees in violation of
12 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, or officer or agent of the
16 employer, has knowingly and intentionally failed to properly
17 classify an individual as an employee under section 5, the
18 secretary may issue a stop-work order requiring the cessation of
19 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 Section 9. Procedure.

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

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

22 Section 10. Commonwealth Court.

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

25 Section 11. Certain agreement prohibited.

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

1 Section 12. Retaliation for action prohibited.

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

16 Section 13. Use of penalty funds.

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

23 Section 14. Rules and regulations.

24 The department may promulgate rules and regulations necessary
25 to implement and administer this act.

26 Section 15. Annual report required.

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

1 calendar year's administration and enforcement of this act. The
2 department may include any relevant facts and statistics that it
3 believes necessary into the content of the report.

4 Section 16. Applicability.

5 This act shall not be construed to bring an individual within
6 the scope of THE MINIMUM WAGE ACT, THE WAGE PAYMENT AND ←
7 COLLECTION LAW, the Unemployment Compensation Law or the
8 Workers' Compensation Act if the individual is excluded from the
9 scope of 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 19. Effective date.

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