

HB654 Kentucky Legislature – Introduced on February 27, 2008

AN ACT relating to misclassification of employees.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔SECTION 1. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

As used in Sections 1 to 13 of this Act, unless the context otherwise requires:

(1) "Agent of the contractor" means a person having management authority or enforcement powers with respect to a practice or policy of the contractor regarding the classification of an employee, a corporate officer, or a member of the board of directors of the contractor;

(2) "Construction" means any construction, altering, reconstructing, repairing, rehabilitating, refinishing, refurbishing, remodeling, remediating, renovating, custom fabricating, maintenance, landscaping, improving, wrecking, painting, decorating, demolishing, and adding to or subtracting from any building, structure, highway, roadway, street, bridge, alley, sewer, ditch, sewage disposal plant, water works, parking facility, railroad, excavation or other structure, project, development, real property or improvement, or to do any part thereof, whether or not the performance of the work involves the addition to, or fabrication into, any structure, project, development, real property or improvement of any material, property or article of merchandise. Construction shall also include moving construction related materials on the job site and to or from the job site;

(3) "Contractor" means any sole proprietor, partnership, firm, corporation, limited liability company, association, or other legal entity permitted by law to do business within the Commonwealth of Kentucky who engages in construction as defined in this section. Contractor includes a general contractor, a subcontractor, and lower tiered contractor;

- (4) "Executive Director" means the executive director of the Office of Workplace Standards under the direction and supervision of the Commissioner of the Department of Labor;
- (5) "Office" means the Office of Workplace Standards in the Department of Labor;
- (6) "Performing services" means the performance of construction as defined in this section.

➔SECTION 2. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

- (1) Misclassification of an employee as an independent contractor is a violation of this section, and a contractor that violates this section shall be assessed a civil penalty under subsection (15) of Section 14 of this Act.
- (2) A person performing services for a contractor is deemed to be an employee of the contractor and not an independent contractor unless the person:
- (a) Is performing the services free from the direction or control over the means and manner of providing the service, subject only to the right of the contractor, for whom the service is provided, to specify the desired result, both under the person's contract of service and in fact;
 - (b) Is performing services that are outside the usual course of services performed by the contractor;
 - (c) Has a substantial investment of capital beyond ordinary tools and equipment and a personal vehicle;
 - (d) Obtains and pays for the license or permit when the services being provided require a license or permit;
 - (e) Has the right to perform similar services and make such services available to the general public or the business community on a continuing basis;
 - (f) Includes services rendered on a federal income tax schedule as an independent business or profession;

- (g) Furnishes the tools and equipment necessary to provide the service;
 - (h) Hires its own employees without contractor approval, pays the employees without reimbursement from the contractor, and reports the employees' income to the Internal Revenue Service;
 - (i) Is not represented by the contractor to its customers as an employee of the contractor;
 - (j) Is not subject to cancellation or destruction upon severance of the relationship with the contractor;
 - (k) Owns the capital goods, gains the profits, and bears the losses of the business; or
 - (l) Is an owner-operator that provides a motor vehicle and the services of a driver under a written contract that is subject to 49 CFR 376, to a motor carrier.
- (3) In determining whether a contractor has correctly classified a person as an employee or an independent contractor, the office shall also consider whether the contractor does the following on behalf of the person performing the service:
- (a) Withholds, reports, and remits payroll taxes;
 - (b) Pays unemployment insurance taxes as required by KRS Chapter 341; and
 - (c) Maintains worker's compensation insurance as required by KRS Chapter 342.
- (4) A contractor shall not be liable for any subcontractor's failure to properly classify persons performing services as employees, nor shall a subcontractor be liable for any lower tiered subcontractor's failure to properly classify persons performing services as employees.

➔SECTION 3. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

- (1) For purposes of Sections 1 to 13 of this Act, a contractor shall maintain records

for a period of not less than three (3) years from the last date the person performed service for the contractor, regardless of whether the person was classified as an employee or an independent contractor.

(2) Records to be maintained by the contractor shall include all documents related to the nature of the relationship between the contractor and a person performing service for the contractor. Records that shall be maintained include, but shall not be limited to:

(a) The name, address, telephone number, Social Security number, taxpayer identification number, or federal tax identification number of a person performing service for a contractor;

(b) All invoices, billing statements, or other payment records relating to the services performed for the contractor;

(d) Copies of all contracts and agreements with the person, applications for employment by the person with the contractor, and policy or employment manuals of the contractor for the period that the person performed services for the contractor;

(e) Any federal and state tax documents; and

(f) Any other information the office requires in administrative regulations promulgated in accordance with KRS Chapter 13A.

➔SECTION 4. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

(1) The office shall post a summary of the requirements and penalties provided in Sections 1 to 13 of this Act and Section 14 of this Act on its official Internet Web site.

(2) A contractor for whom one (1) or more persons perform services shall post in a conspicuous place on each job site where those persons perform services and in each of its offices, a summary of the provisions of Sections 1 to 13 of this Act.

The office shall prepare and provide such summary without charge upon request of a contractor.

➔SECTION 5. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

The office shall enforce and take necessary actions to ensure compliance with the provisions of Sections 1 to 13 of this Act. The office may:

- (1) Conduct investigations as it deems appropriate;
- (2) Inspect any worksite subject to the provisions of Sections 1 to 13 of this Act, and any documents necessary to determine whether a person is an employee or an independent contractor;
- (3) Compel, by subpoena, the attendance and testimony of witnesses, production of books, payrolls, records, papers, and other evidence in any investigation; and
- (4) Administer oaths to witnesses.

➔SECTION 6. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

(1) Any person aggrieved by a contractor, or an agent of the contractor, for violations of Sections 1 to 13 of this Act, or any person who has a reasonable belief that the contractor or the agent of the contractor is in violation of or has violated Sections 1 to 13 of this Act, may file a complaint with the office. The complaint shall be filed on a form supplied by the office and in a manner prescribed by the office.

(2) (a) The office shall conduct an investigation to ascertain the facts relating to an alleged violation. The investigation may be made by written or oral inquiry, field visit, conference, or any method or combination of methods the office deems appropriate.

(b) If the office determines that a contractor has violated a provision of Sections 1 to 13 of this Act, the office may:

1. Issue and cause to be served an order to cease and desist from further violation;
 2. Take affirmative or other action as deemed reasonable to eliminate the effect of a violation;
 3. Initiate actions to collect the amount of any wages, salary, employment benefits, or other compensation denied or lost to any person adversely affected by the violation; and
 4. Assess civil penalties provided in Section 14 of this Act.
- (3) All orders or decisions of the executive director may be appealed, and upon appeal, an administrative hearing shall be conducted in accordance with KRS Chapter 13B.

➔SECTION 7. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

If a contractor violates an order of the office issued under Sections 1 to 13 of this Act, the executive director may commence an action and obtain from the court an order commanding the contractor to obey the order, or be adjudged guilty of contempt of court and punished accordingly.

➔SECTION 8. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

(1) Notwithstanding the administrative remedy provided in Section 6 of this Act, any person aggrieved by a contractor for a violation of Sections 1 to 13 of this Act, may file a civil action in Circuit Court in the county where the alleged violation occurred or where the aggrieved person resides. Civil actions may be brought by one (1) or more persons for or on behalf of themselves and other persons similarly situated. The court, in rendering a judgement in such civil action, may order:

(a) Restitution of any wages or other compensation denied or lost to the

aggrieved person, plus an equal amount in liquidated damages;

(b) In the case of unlawful retaliation, all legal or equitable relief as the court deems appropriate; and

(c) Reasonable attorney's fees and costs.

(2) An action brought under this section or Section 6 of this Act terminates upon the passing of three (3) years from the final date of performing services for the contractor.

➔SECTION 9. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

No contractor or agent of a contractor shall retaliate through discharge or in any other manner discriminate against any person for:

(1) Making a complaint to a contractor, a co-worker, or to a state or federal agency relating to a violation of Sections 1 to 13 of this Act;

(2) Initiating any proceeding under Sections 5, 6, or 8 of this Act; or

(3) Testifying or preparing to testify in an investigation by the executive director.

➔SECTION 10. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

The office shall promulgate administrative regulations to implement and administer Sections 1 to 13 of this Act.

➔SECTION 11. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

The provisions of Sections 1 to 13 of this Act shall not be waived.

➔SECTION 12. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

Upon determining that a contractor has misclassified employees as independent contractors, the executive director shall notify the Department of Revenue, Office of Workers Claims in the Department of Labor, and the Office of Employment and

Training in the Education Cabinet, to verify such contractor's compliance with other applicable laws. Information shared by the agencies shall be confidential and shall not be published or open to public inspection. Sharing of information and records required in this section shall comply with applicable state and federal requirements relating to confidentiality and disclosure of information and records.

➔SECTION 13. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

The provisions of Sections 1 to 13 of this Act and Section 14 of this Act shall not be interpreted or construed to supercede or repeal any provision of applicable state or federal law, but shall be held to be ancillary and supplemental thereto.

➔Section 14. KRS 337.990 is amended to read as follows:

The following civil penalties shall be imposed, in accordance with the provisions in KRS 336.985, for violations of the provisions of this chapter:

- (1) Any firm, individual, partnership, or corporation that violates KRS 337.020 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each offense. Each failure to pay an employee the wages when due him under KRS 337.020 shall constitute a separate offense.
- (2) Any employer who violates KRS 337.050 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).
- (3) Any employer who violates KRS 337.055 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each offense and shall make full payment to the employee by reason of the violation. Each failure to pay an employee the wages as required by KRS 337.055 shall constitute a separate offense.
- (4) Any employer who violates KRS 337.060 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) and shall also be liable to the affected employee for the amount withheld, plus

interest at the rate of ten percent (10%) per annum.

- (5) Any employer who violates the provisions of KRS 337.065 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each offense and shall make full payment to the employee by reason of the violation.
- (6) Any person who fails to comply with KRS 337.070 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each offense and each day that the failure continues shall be deemed a separate offense.
- (7) Any employer who violates any provision of KRS 337.275 to 337.325, KRS 337.345, ~~and~~ KRS 337.385 to 337.405, **and Section 4 of this Act** or willfully hinders or delays the executive director or his authorized representative in the performance of his duties under KRS 337.295, or fails to keep and preserve any records as required under KRS 337.320, ~~and~~ 337.325, **and Section 3 of this Act**, or falsifies any record, or refuses to make any record or transcription thereof accessible to the executive director or his authorized representative shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000). A civil penalty of not less than one thousand dollars (\$1,000) shall be assessed for any subsequent violation of KRS 337.285(4) to (9) and each day the employer violates KRS 337.285(4) to (9) shall constitute a separate offense and penalty.
- (8) Any employer who pays or agrees to pay wages at a rate less than the rate applicable under KRS 337.275 and 337.285, or any wage order issued pursuant thereto shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).
- (9) Any employer who discharges or in any other manner discriminates against any employee because the employee has made any complaint to his employer, to the

executive director, or to his authorized representative that he has not been paid wages in accordance with KRS 337.275 and 337.285 or regulations issued thereunder, or because the employee has caused to be instituted or is about to cause to be instituted any proceeding under or related to KRS 337.385, or because the employee has testified or is about to testify in any such proceeding, shall be deemed in violation of KRS 337.275 to 337.325, KRS 337.345, and KRS 337.385 to 337.405 and shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).

- (10) Any employer who violates KRS 337.365 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).
- (11) Any person who violates KRS 337.530 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).
- (12) Any contractor or subcontractor who violates any wage or work hours provision in any contract under KRS 337.505 to 337.550 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each offense, and the contractor or subcontractor shall make full restitution to all employees to whom he is legally indebted by reason of said violation. The prime contractor shall be jointly and severally liable with a subcontractor for wages due an employee of the subcontractor. For a flagrant or repeated violation the offending contractor or subcontractor shall be barred from bidding on, or working on, any and all public works contracts, either in his name or in the name of any other company, firm, or other entity in which he might be interested for a period of two (2) years from the date of the last offense. Each day of violation shall constitute a separate offense, and the violation as affects each individual worker shall constitute a separate offense.
- (13) Any public authority, public official, or member of a public authority who willfully fails to comply or to require compliance with KRS 337.505 to 337.550 shall be

assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each offense. Each day of violation shall constitute a separate offense. If a public authority, public official or member of a public authority willfully or negligently fails to comply with KRS 337.505 to 337.550 and the failure results in damages, injury or loss to any person, the public authority, public official, or member of a public authority may be held liable in a civil action.

- (14) A person shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) when that person discharges or in any other manner discriminates against an employee because the employee has:
- (a) Made any complaint to his employer, the executive director, or any other person; or
 - (b) Instituted, or caused to be instituted, any proceeding under or related to KRS 337.420 to 337.433; or
 - (c) Testified, or is about to testify, in any such proceedings.

- (15) (a) A contractor that violates Section 2 of this Act shall be assessed a civil penalty not to exceed one thousand dollars (\$1,000) for the first violation. A contractor shall be assessed a civil penalty not to exceed twenty-five hundred dollars (\$2,500) for each subsequent violation within a five (5) year period. Each day of violation shall constitute a separate offense, and the violation as affects each person shall constitute a separate offense. In determining the amount of the civil penalty, the executive director shall consider the appropriateness of the civil penalty to the size of the contractor and the gravity of the violation.**
- (b) For any second or subsequent violation determined by the office which is within five (5) years of an earlier violation, the executive director shall post the contractor's name on the official Internet Web site of the office. Upon**

such posting, the office shall notify the contractor.

(c) Any contractor who willfully violates Section 2 of this Act, or obstructs the executive director, or his authorized representative, or any other person authorized to inspect places of employment, shall be liable for civil penalties up to double the amount provided in paragraph (a) of this subsection . The increased civil penalty shall be imposed in cases in which a contractor's conduct is proven by a preponderance of the evidence to be willful.

(d) The civil penalties imposed in this subsection shall be in addition to any other penalties provided or recovered under other provisions of the Kentucky Revised Statutes or federal law.

➔Section 15. KRS 45A.485 is amended to read as follows:

- (1) Any state contract awarded under KRS Chapter 45A, 175, 176, 177, or 180 after July 15, 1994, shall require the contractor and all subcontractors performing work under the contract to:
 - (a) Reveal any final determination of a violation by their respective company within the previous five (5) year period pursuant to KRS Chapters 136, 139, 141, 337, 338, 341, and 342 that apply to the contractor or subcontractor; and
 - (b) Be in continuous compliance with the provisions of KRS Chapters 136, 139, 141, 337, 338, 341, and 342 that apply to the contractor or subcontractor for the duration of the contract.
- (2) A contractor's failure to reveal a final determination of a violation by the contractor of KRS Chapters 136, 139, 141, 337, 338, 341, and 342 or to comply with these statutes for the duration of the contract shall be grounds for the Commonwealth's:
 - (a) Cancellation of the contract; and
 - (b) Disqualification of the contractor from eligibility for future state contracts for a period of two (2) years.
- (3) A subcontractor's failure to reveal a final determination of a violation by the

subcontractor of KRS Chapters 136, 139, 141, 337, 338, 341, and 342 or to comply with these statutes for the duration of the contract shall be grounds for the Commonwealth's disqualification of the subcontractor from eligibility for future state contracts for a period of two (2) years.

(4) Notwithstanding the provisions of subsections (1),(2), and (3) of this section, a contractor, as defined in Section 1 of this Act, that has been determined to have violated Section 2 of this Act, been assessed civil penalties for such violation, and whose name has been posted on the Internet Web site of the Office of Workplace Standards in the Labor Cabinet resulting from the violations, shall not be awarded a contract under this chapter or KRS Chapters 175, 176, 177, and 180, for a period of four (4) years from the date of the last violation.