

Note:

Independent Contractor Bill 2400 in Pennsylvania Legislature:

Construction contractors in Pennsylvania that misclassify their employees as independent contractors or pay them under the table to evade compliance with state and federal tax and labor laws could receive prison sentences and stiff fines under the Construction Industry Independent Contractor Act that the Pennsylvania State House approved June 9, 2008 by a vote of 122-76. It has now been sent to the Pennsylvania Senate.

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THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2400 Session of 2008

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TAYLOR,

WAGNER, WALKO, WATERS, J. WHITE, PERZEL AND
MARSHALL,
APRIL 3, 2008

AS AMENDED ON THIRD CONSIDERATION, HOUSE OF
REPRESENTATIVES,
JUNE 9, 2008

AN ACT

***Providing for the criteria for independent contractors in
the construction industry; and imposing penalties.***

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

Section 1 - Short title

This act shall be known and may be cited as the
Construction Industry Independent Contractor Act.

Section 2 - Legislative intent

The General Assembly finds that increasingly employers in the
construction industry are improperly classifying employees as
independent contractors or paying unreported compensation in order to
evade compliance with Federal and State laws. These actions deprive
these workers of Social Security benefits and other benefits, including
overtime pay, while reducing the employers' Federal and State tax
withholdings and related obligations. These practices put
employers that bear higher business costs for complying
with applicable law at a competitive disadvantage with
those who do not follow the law.

In order to restrict and eliminate these actions the
General Assembly sees the need to enact legislation to
specifically address these issues.

Section 3 - Definitions

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

Construction:

Construction, reconstruction, demolition, alteration,
modification, erection, custom, fabrication, repair work or

maintenance work done on any real property or premises under contract, whether or not the work is for a public body and paid for from public funds.

Department:

The Department of Labor and Industry of the Commonwealth

Employer:

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

Minimum Wage Act:

The act of January 17, 1968 (P.L.11, No.5), known as The Minimum Wage Act of 1968

Secretary:

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

Unemployment Compensation Law:

The act of December 5, 1936(2nd Sp.Sess., 1937 P.L.2897, No.1), known as the Unemployment Compensation Law

Wage Payment and Collection Law:

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

Workers' Compensation Act:

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

Section 4 - Certain services deemed employment and exceptions

General rule:

For purposes of the Minimum Wage Act, the Wage Payment and Collection Law, the Unemployment Compensation Law and the Workers' Compensation Act, an individual engaging in or performing services in the commercial or residential building construction industry for remuneration is presumed to be an employee unless:

The individual has been and will continue to be free from control or direction over performance of such services both under the contract of service and in fact; and as to such services, the individual is customarily engaged in an independently established trade, occupation, profession or business.

Independent contractor criteria:

An individual engaging in or performing services in the commercial or residential building construction industry for remuneration shall be deemed an independent contractor if the individual can demonstrate, by credible evidence, that the individual meets all of the following criteria:

Maintains a separate business location that is separate from the location of the person or entity for whom services are being performed, with the individual's own office, and operates with owned or leased equipment and other facilities. For purposes of this paragraph, an office may be maintained in the individual's residence if the individual is licensed to perform the specific kind and quality of work required by the contracts specified in this subsection by all State and local licensing authorities.

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

Includes income and losses from services rendered on a Federal income tax schedule as an independent business or profession.

Incurs the main expenses related to the work.

Is responsible for the satisfactory completion of the work and is liable for a failure to complete the work.

Realizes a profit or loss under contracts to perform work.

The success or failure of the individual's business depends on the relationship of business receipts to expenditures.

Has through ownership, or a written and executed leasing arrangement with a person other than the employer, the tools, equipment and other assets necessary to perform the services.

Makes services available to other businesses, governmental agencies in this Commonwealth or to the general public through business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services.

Has continuing or recurring business liabilities or obligations.

Performs the services through a business in which the individual has a principal proprietary interest.

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

Factor not to be considered:

The failure to withhold Federal or State income taxes or pay unemployment compensation taxes with respect to an individual's remuneration shall not be considered in determining whether the individual is an independent contractor for purposes of the Unemployment Compensation Law or the Workers' Compensation Act.

For purposes of this section, each employment relationship shall be considered separately.

Section 5 - Improper classification of employees

Offense defined:

An employer, or officer or agent of an employer, commits a violation of this act if the employer, officer or agent fails to properly classify the individual as an employee with the intent of evading the requirements of the Minimum Wage Act, the Wage Payment and Collection Law, the Unemployment Compensation Law or the Workers' Compensation Act and shall be subject to the penalties, remedies or actions contained in this act.

Enforcement:

When the secretary finds that an employer has violated a provision of this act, the secretary may refer the matter to the Office of Attorney General for investigation and prosecution. Nothing in this act shall be deemed to limit the authority of the Attorney General to investigate and prosecute violations of this act.

Conspiracy by other parties:

A party that does not meet the definition of "employer" in section 3, but which contracts with an employer knowing the employer intends to misclassify employees in violation of this act shall be subject to the same penalties, remedies or other actions as the employer found to be in violation of this act.

Section 6 - Criminal penalties**Knowing violation:**

An employer, or officer or agent of the employer, that knowingly violates section 5(a) commits a felony of the third degree and shall, upon conviction: be sentenced to pay a fine of not more than \$15,000 or imprisonment for not more than three and one-half years, or both, for a first offense; and be sentenced to pay a fine of not more than \$30,000 or imprisonment for not more than seven years, or both, for a subsequent offense.

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

Summary offense:

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

Section 7 - Civil actions and remedies.

Debarment and order to show cause:

If the secretary receives information indicating that an employer, or officer or agent of the employer, has knowingly and intentionally violated this act, or has been convicted of a violation of this act, the secretary shall issue an order to show cause why the individual should not be found in violation of this act and subject to debarment. An individual served with an order to show cause shall have a period of 20 days from the date the order is served to file an answer in writing. If the individual fails to file a timely and adequate answer to the order to show cause, the secretary shall issue an immediate debarment or immediately assess penalties as provided in this section, or both. The secretary shall notify all public bodies in this Commonwealth of the name of the employer, and no contract shall be awarded to the employer or to any firm, corporation or partnership in which the employer has an interest until a period of up to three years, as determined by the secretary, has elapsed from the date of the notice.

Administrative penalties:

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

Actions by employees:

An individual who has not been properly classified as an employee may bring a civil action for damages against the employer for knowingly and intentionally failing to properly classify the employee. An individual's representative, including a labor organization, may bring the action on behalf of the individual or as a class action. The court may award attorney fees and other costs of the action in addition to damages to an individual or

class of individuals who have not been properly classified as employees in violation of section 5(a).

Section 8 - Stop-work orders

Issuance of order:

If the secretary determines, after notice and hearing, that an employer, or officer or agent of the employer, has knowingly and intentionally failed to properly classify an individual as an employee under section 5, the secretary may issue a stop-work order requiring the cessation of all business operations within 72 hours of the determination.

The order shall take effect when served upon the employer or, for a particular employer worksite, when served at the worksite.

The order shall remain in effect until the secretary issues an order releasing the stop-work order or upon finding that the employer has properly classified the individual as an employee.

The employer shall file with the department periodic reports for a probationary period that shall not exceed two years that demonstrate the employer's continued compliance with this section.

The department shall promulgate rules and regulations to determine filing times and report requirements.

Applicability of orders:

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

Penalty:

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

Section 9 - Procedure

Hearings:

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

Subpoena powers:

The department has the power to subpoena witnesses, administer oaths, examine witnesses and take testimony or compel the production of documents. Upon application of an attorney for the Commonwealth, the department may issue a subpoena to compel the production of the documents, computer records and information relating to compliance with the act.

Section 10 - Commonwealth Court

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

Section 11 - Certain agreement prohibited

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

Section 12 - Retaliation for action prohibited

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

provided by this act, notwithstanding the person's failure to prevail on the merits. Taking adverse action against a person within 90 days of the person's exercise of rights protected under this act shall raise a rebuttable presumption of having done so in retaliation for the exercise of those rights.

Section 13 - Use of penalty funds

Any assessments and penalties collected pursuant to this act shall be applied toward implementation, enforcement and administration costs incurred by the department under this act.

However, the secretary may transfer an agreed-to amount of moneys collected to the Attorney General to assist in the enforcement of this act.

Section 14 - Rules and regulations

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

Section 15 - Annual report required

The department shall submit an annual report to the General Assembly by March 1 of the year following the first full year in which this act is in effect, and each year thereafter, detailing, to the maximum extent possible, data on the previous calendar year's administration and enforcement of this act. The department may include any relevant facts and statistics that it believes necessary into the content of the report.

Section 16 - Applicability

This act shall not be construed to bring an individual within the scope of THE MINIMUM WAGE ACT, THE WAGE PAYMENT AND COLLECTION LAW, the Unemployment Compensation Law or the Workers' Compensation Act if the individual is excluded from the scope of the appropriate statute.

Section 17 - Severability

The provisions of this act are severable. If any provision of this act or its application to any individual or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application.

Section 18 - Construction of law

Nothing contained in this act shall be construed to impair or affect in any manner the ability of the department to carry out the powers and duties prescribed by the laws of this Commonwealth or to adopt measures to improve the enforcement of other laws of this Commonwealth.

Section 19 - Effective date

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