

1 State of Arkansas
2 88th General Assembly
3 Regular Session, 2011

A Bill

HOUSE BILL 1324

4
5 By: Representative Nickels

For An Act To Be Entitled

8 AN ACT TO CREATE THE EMPLOYEE CLASSIFICATION ACT; TO
9 ADDRESS THE PRACTICE OF MISCLASSIFYING EMPLOYEES AS
10 INDEPENDENT CONTRACTORS FOR PURPOSES OF UNEMPLOYMENT
11 INSURANCE; AND FOR OTHER PURPOSES.

Subtitle

14 THE EMPLOYEE CLASSIFICATION ACT.

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18 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

19
20 SECTION 1. Arkansas Code Title 11, Chapter 3 is amended to add an
21 additional subchapter to read as follows:

22 11-3-501. Definitions.

23 As used in this subchapter:

24 (1) "Construction" means erection, reconstruction, demolition,
25 alteration, modification, custom fabrication, building, assembling, site
26 preparation, and repair work done on real property or premises under
27 contract, whether or not the work is for a public body and paid from public
28 funds;

29 (2)(A) "Employee" means a person, including a minor, whether
30 lawfully or unlawfully employed in the service of an employer under any
31 contract of hire or apprenticeship, written or oral, expressed or implied,
32 but excluding a person whose employment is casual and not in the course of
33 the trade, business, profession, or occupation of his or her employer and
34 excluding a person who is required to perform work for a municipality or
35 county or the state or federal government upon having been convicted of a
36 criminal offense or while incarcerated.



1 (B) "Employee" does not include an individual who is both
2 a licensee as defined in § 17-42-103 and a qualified real estate agent as
3 that term is defined in section 3508(b)(1) of the Internal Revenue Code of
4 1986, including all regulations under section 3508(b)(1) of the Internal
5 Revenue Code of 1986; and

6 (3) "Employer" means with regard to unemployment compensation:

7 (A) An individual or employing unit that, for some portion
8 of ten (10) or more days, whether the days are or were consecutive, within
9 the current or the preceding calendar year, has or had in employment one (1)
10 or more individuals regardless of whether the same individual was or
11 individuals were employed in each day;

12 (B) An employing unit for which service in employment as
13 defined in § 11-10-210(a)(2) is performed, except as provided in subdivision
14 (3)(D)(ii) or (3)(E)(ii) of this section;

15 (C) An employing unit that is a nonprofit organization and
16 for which service in employment includes without limitation service in
17 employment as defined in § 11-10-210(a)(3), except as provided in subdivision
18 (3)(D)(ii) or (3)(E)(ii) of this section;

19 (D)(i) An employing unit for which agricultural labor as
20 defined in § 11-10-210(a)(5) is performed.

21 (ii) In determining whether or not an employing unit
22 for which service other than agricultural labor is also performed is an
23 employer under subdivision (3)(A) of this section, the wages earned or the
24 employment of an employee performing service in agricultural labor shall not
25 be taken into account. If an employing unit is determined to be an employer
26 of agricultural labor, the employing unit shall be determined an employer for
27 the purposes of subdivision (3)(A) of this section;

28 (E)(i) An employing unit for which domestic service in
29 employment as defined in § 11-10-210(a)(6) is performed.

30 (ii) In determining whether or not an employing unit
31 for which service other than domestic service is also performed is an
32 employer under subdivisions (3)(A)-(D)(i) and (3)(E)(i) of this section, the
33 wages earned or the employment of an employee performing domestic service
34 shall not be taken into account;

35 (F) An individual or employing unit that acquired the
36 organization, trade, or business, or substantially all of the assets of the

1 organization, trade, or business of another that at the time of the
2 acquisition was an employer subject to the Department of Workforce Services
3 Law, § 11-10-101 et seq.;

4 (G) An individual or employing unit that acquired the
5 organization, trade, or business, or substantially all the assets of the
6 organization, trade, or business of another employing unit, if the employment
7 record of the individual or employing unit subsequent to the acquisition,
8 together with the employment record of the acquired unit before the
9 acquisition, both within the same calendar year, would be sufficient to
10 constitute an employing unit as an employer under subdivision (3)(B) of this
11 section;

12 (H) An employing unit that is not an employer by reason of
13 any other subdivision of this section:

14 (i) For which, within either the current or
15 preceding calendar year, service is or was performed with respect to which
16 the employing unit is liable for any federal tax against which credit may be
17 taken for contributions required to be paid into a state unemployment fund;
18 or

19 (ii) That as a condition for approval of the
20 Department of Workforce Services Law, § 11-10-101 et seq., for full tax
21 credit against the tax imposed by the Federal Unemployment Tax Act is
22 required under the act to be an employer under this subchapter; and

23 (I) For the purposes of subdivisions (3)(A) and (C) of
24 this section, employment includes service that would constitute employment
25 but for the fact that the service is deemed to be performed entirely within
26 another state pursuant to an election under an arrangement entered into, in
27 accordance with § 11-10-544(a), by the Director of the Department of
28 Workforce Services and any agency charged with the administration of any
29 other state or federal unemployment compensation law.

30
31 11-3-502. Independent contractors.

32 (a) For purposes of unemployment compensation and improper
33 classification of employees under this subchapter, an individual who performs
34 services in the commercial or residential building construction industry for
35 remuneration is an independent contractor only if:

36 (1) The individual has a written contract to perform the

1 services;

2 (2) The individual is free from control or direction over
3 performance of the services both under the contract of service and in fact;
4 and

5 (3) As to the services, the individual is customarily engaged in
6 an independently established trade, occupation, profession, or business.

7 (b) An individual is engaged customarily in an independently
8 established trade, occupation, profession, or business with respect to
9 services the individual performs in the commercial or residential building
10 construction industry only if:

11 (1) The individual possesses the essential tools, equipment, and
12 other assets necessary to perform the services independent of the person for
13 whom the services are performed;

14 (2) The individual's arrangement with the person for whom the
15 services are performed is such that the individual will realize a profit or
16 suffer a loss as a result of performing the services;

17 (3) The individual performs the services through a business in
18 which the individual has a proprietary interest;

19 (4) The individual maintains a business location that is
20 separate from the location of the person for whom the services are being
21 performed;

22 (5) The individual:

23 (A) Previously performed the same or similar services for
24 another person under subdivision (b)(1)-(4) of this section and while free
25 from direction or control over performance of the services, both under the
26 contract of service and in fact; or

27 (B) Holds himself or herself out to other persons as
28 available and able and in fact is available and able to perform the same or
29 similar services under subdivisions (b)(1)-(4) of this section while free
30 from direction or control over performance of the services; and

31 (6) The individual maintains liability insurance during the term
32 of the contract for at least fifty thousand dollars (\$50,000).

33 (c) The failure to withhold federal or state income taxes or to pay
34 unemployment compensation contributions with respect to an individual's
35 remuneration shall not be considered in determining whether the individual is
36 an independent contractor for purposes of the Department of Workforce

1 Services Law, § 11-10-101.

2 (d) For purposes of this section, each employment relationship shall
3 be considered separately.

4 (e)(1) For purposes of the Department of Workforce Services Law, § 11-
5 10-101 et seq., an individual is customarily engaged in an independently
6 established trade, occupation, profession, or business with regard to
7 services the individual performs in the commercial or residential building
8 construction industry only if the criteria in subsection (b) of this section
9 are satisfied.

10 (2) Except as provided in subdivision (e)(1) of this section,
11 this subchapter does not affect any exclusion from employment under the
12 Department of Workforce Services Law, § 11-10-101.

13
14 11-3-503. Improper classification of employees.

15 (a) An employer or an officer or an agent of an employer violates this
16 subchapter and is subject to the penalties, remedies, and actions contained
17 in this subchapter if the employer, officer, or agent fails to properly
18 classify an individual as an employee for purposes of the Department of
19 Workforce Services Law, § 11-10-101 et seq. and fails to pay contributions,
20 reimbursements, or other amounts required to be paid under the Department of
21 Workforce Services Law, § 11-10-101 et seq.

22 (b) An employer or an officer or an agent of an employer commits a
23 separate violation of this section for each individual who is not properly
24 classified as an employee by the employer or an officer or an agent of an
25 employer.

26 (c)(1) If the Director of the Department of Labor receives information
27 indicating that an employer or an officer or an agent of an employer has
28 violated this subchapter, the director may investigate the matter and issue
29 an order to show cause why the person should not be found in violation of
30 this subchapter.

31 (2)(A) An employer or an officer or an agent of an employer
32 served with an order to show cause shall have a period of twenty (20) days
33 from the date the order is served to file an answer in writing.

34 (B) If the employer or an officer or an agent of an
35 employer fails to file a timely and adequate answer to the order to show
36 cause, the director may give the person notice of a hearing and hold a

1 hearing on the matter.

2 (C) If the employer or an officer or an agent of an
3 employer fails to attend the hearing, the director may:

4 (i) Petition a court of competent jurisdiction to
5 issue a stop-work order as provided in § 11-3-506; or

6 (ii) Immediately assess administrative penalties as
7 provided in § 11-3-505.

8 (d) If after issuing an order to show cause under subsection (c) of
9 this section the director finds probable cause that an employer or an officer
10 or an agent of an employer has committed a criminal violation of this
11 subchapter, the director shall:

12 (1) Refer the matter to the office of the Attorney General for
13 investigation; or

14 (2) Impose administrative penalties under § 11-3-505.

15 (e) A party that does not meet the definition of "employer" in § 11-3-
16 501 but that intentionally contracts with an employer knowing that the
17 employer intends to misclassify employees in violation of this subchapter is
18 subject to the same penalties, remedies, or other actions as the employer
19 found to be in violation of this subchapter.

20 (f) It is a defense to an alleged violation of this section if the
21 person for whom the services were performed believed in good faith that the
22 individual who performed the services qualified as an independent contractor
23 at the time the services were performed.

24
25 11-3-504. Criminal penalties.

26 (a) An employer or an officer or an agent of an employer that
27 purposely violates § 11-3-503(a) commits:

28 (1) A Class C misdemeanor for a first offense; and

29 (2) A Class B misdemeanor for a second or subsequent offense.

30 (b)(1) An employer or an officer or an agent of an employer, that
31 negligently fails to properly classify an individual as an employee under §
32 11-3-503(a) commits a violation and shall upon conviction be sentenced to pay
33 a fine of not more than one thousand dollars (\$1,000).

34 (2) Evidence of a prior conviction under subdivision (b)(1) of
35 this section is admissible as evidence of intent under subsection (a) of this
36 section.

1 (c)(1) The Attorney General shall have concurrent prosecutorial
2 jurisdiction with the prosecuting attorney of the county in which a violation
3 of this section occurred and any offense arising out of an activity
4 prohibited by this subchapter.

5 (2)(A) A person charged with a violation of this subchapter by
6 the Attorney General shall not have standing to challenge the authority of
7 the Attorney General to prosecute the case.

8 (B) If a challenge is made under this subsection, the
9 challenge shall be dismissed and relief shall not be available in the courts
10 of this state to the person making the challenge.

11
12 11-3-505. Administrative penalties.

13 (a) If the Director of the Department of Labor finds that a person has
14 violated this subchapter, the director may assess and collect civil penalties
15 of not more than one thousand dollars (\$1,000) for the first violation and
16 not more than two thousand five hundred dollars (\$2,500) for each subsequent
17 violation.

18 (b) In determining the amount of the penalty to be imposed, the
19 director shall consider factors, including without limitation:

20 (1) The history of previous violations by the employer;

21 (2) The seriousness of the current violations;

22 (3) The good faith of the employer; and

23 (4) The size of the employer's business.

24
25 11-3-506. Stop-work orders.

26 (a)(1)(A) If subsequent to the issuance of an order to show cause
27 under § 11-3-503(c), the Director of the Department of Labor determines that
28 an employer or an officer or an agent of the employer has purposely failed to
29 properly classify an individual as an employee under § 11-3-503(a), the
30 director may petition a court of competent jurisdiction to issue a stop-work
31 order requiring that within twenty-four (24) hours after the effective date
32 of the order all work by individuals who are improperly classified cease.

33 (B) However, if the director determines that a majority of
34 individuals working at a site have been purposely improperly classified, the
35 director may petition the court for an order requiring that within twenty-
36 four (24) hours after the effective date of the order all business operations

1 of that employer at each site at which a violation occurred cease.

2 (2)(A) The order shall take effect when served upon the employer
3 or, for a particular employer worksite, when served at the worksite.

4 (B) The order shall remain in effect until the court issues
5 an order releasing the stop-work order or if the court finds that the
6 employer or officer or agent of the employer is no longer in violation of
7 this subchapter.

8 (3) An order releasing a stop-work order may include a
9 requirement that the employer file with the Department of Labor periodic
10 reports for a probationary period that shall not exceed two (2) years
11 demonstrating the employer's continued compliance with this subchapter.

12 (b) A court hearing an action under this section shall assess a
13 penalty of one thousand dollars (\$1,000) per day against an employer for each
14 day that the employer conducts business operations that are in violation of a
15 stop-work order issued under this section.

16 (c) A stop-work order under subsection (a) of this section and a
17 penalty under subsection (b) of this section shall be in effect against any
18 successor corporation or business entity that has one (1) or more of the same
19 principals or officers as the employer against whom the stop-work order was
20 issued or penalties imposed and that is engaged in the same or equivalent
21 trade or activity.

22
23 11-3-507. Administrative procedure.

24 (a) Actions taken under §§ 11-3-503(c) and 11-3-505 are subject to the
25 Arkansas Administrative Procedure Act, § 25-15-201 et seq.

26 (b)(1) The Department of Labor may subpoena witnesses, administer
27 oaths, examine witnesses, and take testimony or compel the production of
28 documents under this subchapter.

29 (2) The Director of the Department of Labor may petition a court
30 of competent jurisdiction to enforce any order or subpoena issued under this
31 subchapter.

32
33 11-3-508. Certain agreements prohibited.

34 (a) A person shall not require or demand that an individual enter into
35 an agreement or sign a document that results in the improper classification
36 of that individual as an independent contractor.

1 (b)(1) A violation of subsection (a) of this section is punishable by
2 an administrative fine of not less than one thousand dollars (\$1,000) and not
3 more than two thousand five hundred dollars (\$2,500).

4 (2) Each violation of subsection (a) of this section is a
5 separate offense under this section.

6
7 11-3-509. Retaliation prohibited.

8 (a)(1) It is unlawful for an employer or an officer or an agent of an
9 employer to discriminate in any manner or take adverse action against any
10 person in retaliation for exercising rights protected under this subchapter.

11 (2) Rights protected under this subchapter include without
12 limitation the right to file a complaint or inform any person about an
13 employer's noncompliance with this subchapter.

14 (b) A person who in good faith alleges noncompliance with this
15 subchapter shall be afforded the rights provided by this subchapter,
16 notwithstanding the person's failure to prevail on the merits.

17 (c) The taking of an adverse action by an employer or an officer or an
18 agent of an employer against a person within ninety (90) days of the person's
19 exercise of rights protected under this subchapter shall raise a rebuttable
20 presumption that the adverse action was taken in retaliation for the exercise
21 of rights under this subchapter.

22
23 11-3-510. Availability of information.

24 (a) The Department of Labor shall create a poster for job sites that
25 outlines the requirements and penalties under this subchapter and shall make
26 the poster available on its website.

27 (b) At the discretion of the Director of the Department of Labor, a
28 toll-free hotline telephone number may be established to receive allegations
29 of violations of this subchapter.

30
31 11-3-511. Use of penalty funds.

32 Any sum collected as a penalty under this subchapter shall be paid into
33 the Unemployment Compensation Fund created under § 11-10-801 of the
34 Department of Workforce Services Law, § 11-10-101, et seq.

35
36 11-3-512. Rules.

1 The Department of Labor shall adopt rules necessary to implement this
2 subchapter.

3
4 11-3-513. Annual report required.

5 (a) The Department of Labor shall submit an annual report to the
6 General Assembly by March 1 of the year following the first full year in
7 which this subchapter is in effect and each year thereafter detailing to the
8 maximum extent possible data on the previous calendar year's administration
9 and enforcement of this subchapter.

10 (b) The department may include any relevant facts and statistics that
11 the department believes necessary in the content of the report.

12
13 11-3-514. Construction of law.

14 (a) This subchapter does not impair or affect in any manner the
15 ability of the Department of Labor and Director of the Department of Labor to
16 carry out the powers and duties prescribed by the laws of this state.

17 (b) This subchapter does not preclude the department from finding
18 improper classification in any industry on the basis of the laws of this
19 state.

20
21 11-3-515. Funding limitation.

22 The Department of Labor shall not enforce this subchapter until
23 adequate funding is available.

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