

1 State of Arkansas
2 89th General Assembly
3 Regular Session, 2013
4

A Bill

HOUSE BILL 2245

5 By: Representative Murdock
6

For An Act To Be Entitled

8 AN ACT TO REQUIRE A CONTRACTOR WHO BIDS ON A PUBLIC
9 CONSTRUCTION CONTRACT TO MAINTAIN RECORDS; TO PERMIT
10 THE INSPECTION OF THE CONTRACTOR'S RECORDS; TO IMPOSE
11 A CIVIL PENALTY FOR THE FAILURE OF A CONTRACTOR TO
12 MAINTAIN RECORDS OR ALLOW INSPECTION OF THE RECORDS;
13 TO IMPOSE A CIVIL PENALTY FOR MISCLASSIFICATION OF AN
14 INDIVIDUAL AS AN INDEPENDENT CONTRACTOR; AND FOR
15 OTHER PURPOSES.
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Subtitle

18 AN ACT TO REQUIRE A CONTRACTOR WHO BIDS
19 ON A PUBLIC CONSTRUCTION CONTRACT TO
20 MAINTAIN RECORDS; TO PERMIT THE
21 INSPECTION OF RECORDS; AND TO IMPOSE A
22 CIVIL PENALTY.
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26 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
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28 SECTION 1. Arkansas Code Title 22, Chapter 9, Subchapter 2, is amended
29 to add two additional sections to read as follows:

30 22-9-215. Contractors – Classification of employees.

31 (a) When a contractor is awarded a public construction contract by the
32 state, a county, a municipality, a school district, or other political
33 subdivision of the state under §§ 19-4-1405 and 22-9-203, an individual:

34 (1) Shall be classified as an employee of the contractor if the
35 individual is employed in the service of the contractor under a contract of
36 hire or apprenticeship, written or oral, expressed or implied;



1 (2) Shall not be classified as an employee of the contractor if:

2 (A) The individual is not employed in the course of the
3 trade, business, profession, or occupation of the contractor; or

4 (B) The individual:

5 (i) Holds a current certification of noncoverage
6 from the Workers' Compensation Commission under the Workers' Compensation
7 Law, § 11-9-101 et seq.; and

8 (ii) Is conclusively presumed not to be an employee
9 for purposes of this section and § 22-9-216 during the term of the
10 individual's certification or a renewal of his or her certification or until
11 he or she elects otherwise, whichever time period is shorter; and

12 (3) Shall be classified as an independent contractor of the
13 contractor if the individual:

14 (A) Has a written contract to perform services;

15 (B) Is free from control or direction over performance of
16 the services both under the contract of service and in fact; and

17 (C)(i) Is customarily engaged in an independently
18 established trade, occupation, profession, or business.

19 (ii) An individual is customarily engaged in an
20 independently established trade, occupation, profession, or business with
21 respect to services the individual performs in the commercial or residential
22 building construction industry if the individual:

23 (a) Possesses the essential tools, equipment,
24 and other assets necessary to perform the services independent of the person
25 for whom the services are performed;

26 (b) Will realize a profit or suffer a loss as
27 a result of performing the services;

28 (c) Performs the services through a business
29 in which the individual has a proprietary interest;

30 (d) Maintains a business location that is
31 separate from the location of the person for whom the services are being
32 performed;

33 (e) Holds himself or herself out to other
34 persons as available and able to perform the same or similar services while
35 free from direction or control over performance of the services; and

36 (f) Maintains liability insurance during the

1 term of the contract.

2 (b) The failure to withhold federal or state income taxes or pay
3 workers' compensation premiums with respect to an individual's remuneration
4 shall not be considered in determining whether the individual is an employee
5 or an independent contractor.

6 (c)(1) An individual who is an independent contractor as determined
7 under this section is not an employee.

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

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11 22-9-216. Contractors – Proof of documentation – Misclassification of
12 employees.

13 (a)(1) The Department of Labor may request that a contractor who bids
14 on a public construction contract of the state, a county, a municipality, a
15 school district, or other political subdivision of the state under §§ 19-4-
16 1405 and 22-9-203 provide the information described under subdivision (a)(2)
17 of this section.

18 (b) A contractor shall permit the entities listed in subdivision
19 (a)(1) of this section to access its records within five (5) business days of
20 the entities' request under subsection (a) of this section.

21 (c)(1) If a contractor does not keep the records required under
22 subsection (a) of this section or fails to allow the Department of Labor
23 access to its records under subsections (a) and (b) of this section, the
24 Department of Labor shall investigate whether the failure or refusal was
25 intentional.

26 (2) The Department of Labor shall issue a written warning and
27 not assess a civil monetary penalty if it finds that the contractor did not
28 intentionally fail to keep records required under subsection (a) of this
29 section or refuse to allow the Department of Labor access to its records
30 under subsections (a) and (b) of this section.

31 (3)(A) If the Department of Labor finds that the contractor
32 intentionally failed to keep the records required under subsection (a) of
33 this section or allow the Department of Labor access to its records under
34 subsections (a) and (b) of this section, the contractor shall be assessed a
35 civil penalty in the following amount for each employee or independent
36 contractor it failed to keep records for under subsection (a) of this

1 section:

2 (i) Not more than two hundred fifty dollars (\$250)
3 for the contractor's first violation;

4 (ii) Not more than five hundred dollars (\$500) for a
5 second violation; and

6 (iii) Not less than one hundred dollars (\$100) and
7 not more than (\$1000) for each additional violation.

8 (B) The Department of Labor shall consider the following
9 when determining the amount of each civil penalty:

10 (i) The previous violations of the contractor;

11 (ii) The seriousness of the violation; and

12 (iii) The size of the contractor.

13 (d)(1) If the Department of Labor determines that a contractor has
14 misclassified an individual as an independent contractor rather than an
15 employee under § 22-9-215, the Department of Labor shall investigate whether
16 the misclassification was:

17 (A) Intentional; and

18 (B) Made to avoid the payment of social security income
19 tax, unemployment tax, or workers' compensation premiums.

20 (2) The Department of Labor shall issue a written warning and
21 shall not assess a civil monetary penalty if the Department of Labor finds
22 that the contractor's misclassification of an individual as an independent
23 contractor rather than an employee under § 22-9-215 was not intentional and
24 not made to avoid the payment of social security income tax, unemployment
25 tax, or workers' compensation premiums.

26 (3)(A) If the Department of Labor finds that the contractor
27 intentionally misclassified an individual as an independent contractor rather
28 than an employee to avoid the payment of social security income tax,
29 unemployment tax, or workers' compensation premiums, the contractor shall be
30 assessed a percentage of the contractor's total contract with the state,
31 county, municipality, school district, or other political subdivision of the
32 state as a civil penalty in the following amount:

33 (i) Not more than two hundred fifty dollars (\$250)
34 for the contractor's first violation;

35 (ii) Not more than five hundred dollars (\$500) for a
36 second violation; and

1 (iii) Not less than one hundred dollars (\$100) and
2 not more than (\$1000) for each additional violation.

3 (B) The Department of Labor shall consider the following
4 when determining the amount of each civil penalty:

5 (i) The previous violations of the contractor;

6 (ii) The seriousness of the violation; and

7 (iii) The size of the contractor.

8 (e) The Department of Labor shall not impose the civil penalties under
9 subsection (c)(3)(A) of this section or subdivision (d)(3)(A) of this section
10 until it gives a contractor notice and opportunity for a hearing under the
11 Arkansas Administrative Procedure Act, § 25-15-201 et seq.

12 (f)(1) The Department of Labor may file a legal action in the name of
13 the State of Arkansas, without paying costs or giving bond for costs, to
14 recover the civil penalty under subsection (c)(3)(A) of this section or
15 subdivision (d)(3)(A) of this section.

16 (2) A legal action shall not be filed until:

17 (A) Notice and opportunity for a hearing have been
18 provided pursuant to the Arkansas Administrative Procedure Act, § 25-15-201
19 et seq.; and

20 (B) Entry of a final administrative order.

21 (3)(A) Following any appeals taken pursuant to the Arkansas
22 Administrative Procedure Act, § 25-15-201 et seq., the Department of Labor
23 may enforce its administrative order in any court of competent jurisdiction.

24 (B) The Department of Labor's findings of fact shall be
25 conclusive.

26 (4)(A) The recovery of a civil penalty and attorney's fees shall
27 be placed in the General Revenue Fund Account of the State Apportionment
28 Fund.

29 (5) This section does not relieve an unsuccessful defendant from
30 paying costs.

31 (6) The filing of a legal action is a remedy of the state in
32 addition to all other remedies available under the law.

33 (g) The Department of Labor shall establish rules to enforce this
34 section.

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