

AN ACT concerning employment.

**Be it enacted by the People of the State of Illinois,
represented in the General Assembly:**

Section 1. Short title. This Act may be cited as the Employee Classification Act.

Section 3. Purpose. This Act is intended to address the practice of misclassifying employees as independent contractors.

Section 5. Definitions. As used in this Act:

"Construction" means any constructing, 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 herein described involves the addition to, or fabrication into, any structure, project, development, real property or improvement herein described of any material or

article of merchandise. Construction shall also include moving construction related materials on the job site to or from the job site.

"Contractor" means any sole proprietor, partnership, firm, corporation, limited liability company, association or other legal entity permitted by law to do business within the State of Illinois who engages in construction as defined in this Act.

"Contractor" includes a general contractor and a subcontractor.

"Department" means the Department of Labor.

"Director" means the Director of the Department of Labor.

"Employer" means any contractor that employs individuals deemed employees under Section 10 of this Act; however, "employer" does not include (i) the State of Illinois or its officers, agencies, or political subdivisions or (ii) the federal government.

"Entity" means any contractor for which an individual is performing services and is not classified as an employee under Section 10 of this Act; however, "entity" does not include (i) the State of Illinois or its officers, agencies, or political subdivisions or (ii) the federal government.

"Interested party" means a person with an interest in compliance with this Act.

"Performing services" means the performance of any constructing, 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 herein described involves the addition to, or fabrication into, any structure, project, development, real property or improvement herein described of any material or article of merchandise. Construction shall also include moving construction related materials on the job site to or from the job site.

Section 10. Applicability; status of individuals performing service.

(a) For the purposes of this Act, an individual performing services for a contractor is deemed to be an employee of the employer except as provided in subsections (b) and (c) of this Section.

(b) An individual performing services for a contractor is deemed to be an employee of the contractor unless it is shown that:

(1) the individual has been and will continue to be free from control or direction over the performance of the service for the contractor, both under the individual's

contract of service and in fact;

(2) the service performed by the individual is outside the usual course of services performed by the contractor; and

(3) the individual is engaged in an independently established trade, occupation, profession or business; or

(4) the individual is deemed a legitimate sole proprietor or partnership under subsection (c) of this Section.

(c) The sole proprietor or partnership performing services for a contractor as a subcontractor is deemed legitimate if it is shown that:

(1) the sole proprietor or partnership is performing the service 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;

(2) the sole proprietor or partnership is not subject to cancellation or destruction upon severance of the relationship with the contractor;

(3) the sole proprietor or partnership has a substantial investment of capital in the sole proprietorship or partnership beyond ordinary tools and equipment and a personal vehicle;

(4) the sole proprietor or partnership owns the capital goods and gains the profits and bears the losses of the

sole proprietorship or partnership;

(5) the sole proprietor or partnership makes its services available to the general public or the business community on a continuing basis;

(6) the sole proprietor or partnership includes services rendered on a Federal Income Tax Schedule as an independent business or profession;

(7) the sole proprietor or partnership performs services for the contractor under the sole proprietorship's or partnership's name;

(8) when the services being provided require a license or permit, the sole proprietor or partnership obtains and pays for the license or permit in the sole proprietorship's or partnership's name;

(9) the sole proprietor or partnership furnishes the tools and equipment necessary to provide the service;

(10) if necessary, the sole proprietor or partnership 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;

(11) the contractor does not represent the sole proprietorship or partnership as an employee of the contractor to its customers; and

(12) the sole proprietor or partnership has the right to perform similar services for others on whatever basis

and whenever it chooses.

(d) Where a sole proprietor or partnership performing services for a contractor as a subcontractor is deemed not legitimate under subsection (c) of this Section, the sole proprietorship or partnership shall be deemed an individual for purposes of this Act.

(e) Subcontractors or lower tiered contractors are subject to all provisions of this Act.

(f) A contractor shall not be liable under this Act 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 15. Notice.

(a) The Department shall post a summary of the requirements of this Act in English, Spanish, and Polish on its official web site and on bulletin boards in each of its offices.

(b) An entity for whom one or more individuals perform services who are not classified as employees under Section 10 of this Act shall post and keep posted, in a conspicuous place on each job site where those individuals perform services and in each of its offices, a notice in English, Spanish, and Polish, prepared by the Department, summarizing the requirements of this Act. The Department shall furnish copies of summaries without charge to entities upon request.

Section 20. Failure to properly designate or classify individuals performing services as employees. It is a violation of this Act for an employer or entity not to designate an individual as an employee under Section 10 of this Act unless the employer or entity satisfies the provisions of Section 10 of this Act.

Section 25. Enforcement.

(a) Any interested party may file a complaint with the Department against an entity or employer covered under this Act if there is a reasonable belief that the entity or employer is in violation of this Act. It shall be the duty of the Department to enforce the provisions of this Act. The Department shall have the power to conduct investigations in connection with the administration and enforcement of this Act and any investigator with the Department shall be authorized to visit and inspect, at all reasonable times, any places covered by this Act and shall be authorized to inspect, at all reasonable times, documents related to the determination of whether an individual is an employee under Section 10 of this Act. The Director of Labor or his or her representative may compel, by subpoena, the attendance and testimony of witnesses and the production of books, payrolls, records, papers, and other evidence in any investigation and may administer oaths to witnesses.

(b) Whenever the Department believes upon investigation that there has been a violation of any of the provisions of this Act or any rules or regulations promulgated under this Act, the Department may: (i) issue and cause to be served on any party an order to cease and desist from further violation of the Act, (ii) take affirmative or other action as deemed reasonable to eliminate the effect of the violation, (iii) collect the amount of any wages, salary, employment benefits, or other compensation denied or lost to the individual, and (iv) assess any civil penalty allowed by this Act. The civil penalties assessed by the Department as well as any other relief requested by the Department shall be recoverable in an action brought in the name of the people of the State of Illinois by the Attorney General.

Section 30. Attorney General; State's Attorneys. Criminal violations of this Act shall be prosecuted by the Attorney General or the appropriate State's Attorney. The Department shall refer matters to the Attorney General and the appropriate State's Attorney upon determining that a criminal violation may have occurred. In all other proceedings the Department shall be represented by the Attorney General's Office.

Section 35. Contempt. Whenever it appears that any employer or entity has violated a valid order of the Department issued under this Act, the Director of Labor may commence an action

and obtain from the court an order commanding the employer or entity to obey the order of the Department or be adjudged guilty of contempt of court and punished accordingly.

Section 40. Penalties. An employer or entity that violates any of the provisions of this Act or any rule adopted under this Act shall be subject to a civil penalty not to exceed \$1,500 for each violation found in the first audit by the Department. Following a first audit, an employer or entity shall be subject to a civil penalty not to exceed \$2,500 for each repeat violation found by the Department within a 5 year period. For purposes of this Section, each violation of this Act for each person and for each day the violation continues shall constitute a separate and distinct violation. In determining the amount of a penalty, the Director shall consider the appropriateness of the penalty to the employer or entity charged, upon the determination of the gravity of the violations. The amount of the penalty, when finally determined, may be recovered in a civil action filed in any circuit court by the Director of Labor, or a person aggrieved by a violation of this Act or any rule adopted under this Act. In any civil action brought by an interested party pursuant to this Section, the circuit court shall award the interested party 10% of the amount recovered. In such case, the remaining amount recovered shall be submitted to the Director of Labor. Any uncollected amount shall be subject to the provisions of the Illinois State

Collection Act of 1986.

Section 42. Debarments. For any second or subsequent violation determined by the Department which is within 5 years of an earlier violation, the Department shall add the employer or entity's name to a list to be posted on the Department's official website. Upon such notice, the Department shall notify the violating employer or entity. No state contract shall be awarded to an employer or entity appearing on the list until 4 years have elapsed from the date of the last violation.

Section 45. Willful violations.

(a) Whoever willfully violates any of the provisions of this Act or any rule adopted under this Act or whoever obstructs the Director of Labor, or his or her representatives, or any other person authorized to inspect places of employment under this Act shall be liable for penalties up to double the statutory amount.

(b) Whoever willfully violates any of the provisions of this Act or any rule adopted under this Act shall be liable to the employee for punitive damages in an amount equal to the penalties assessed in subsection (a) of this Section.

(c) The penalty shall be imposed in cases in which an employer or entity's conduct is proven by a preponderance of the evidence to be willful. The penalty may be recovered in a civil action brought by the Director of Labor in any circuit

court. In any such action, the Director of Labor shall be represented by the Attorney General. Any uncollected amount shall be subject to the provisions of the Illinois State Collection Act of 1986.

(d) An entity or employer that willfully violates any provision of this Act or any rule adopted under this Act commits a Class C misdemeanor. An entity or employer that commits a second or subsequent violation within a 5 year period commits a Class 4 felony.

Section 50. Employee Classification Fund. All moneys received by the Department as fees and civil penalties under this Act shall be deposited into the Employee Classification Fund and shall be used, subject to appropriation by the General Assembly, by the Department for administration, investigation, and other expenses incurred in carrying out its powers and duties under this Act. The Department shall hire as many investigators and other personnel as may be necessary to carry out the purposes of this Act. Any moneys in the Fund at the end of a fiscal year in excess of those moneys necessary for the Department to carry out its powers and duties under this Act shall be available to the Department for the next fiscal year for any of the Department's duties.

Section 55. Retaliation.

(a) It is a violation of this Act for an employer or

entity, or any agent of an employer or entity, to retaliate through discharge or in any other manner against any person for exercising any rights granted under this Act. Such retaliation shall subject an employer or entity to civil penalties pursuant to this Act or a private cause of action, or both.

(b) It is a violation of this Act for an employer or entity to retaliate against a person for:

(1) making a complaint to an employer or entity, to a co-worker, to a community organization, before a public hearing, or to a State or federal agency that rights guaranteed under this Act have been violated;

(2) causing to be instituted any proceeding under or related to this Act; or

(3) testifying or preparing to testify in an investigation or proceeding under this Act.

Section 60. Private right of action.

(a) An interested party or person aggrieved by a violation of this Act or any rule adopted under this Act by an employer or entity may file suit in circuit court, in the county where the alleged offense occurred or where any person who is party to the action resides, without regard to exhaustion of any alternative administrative remedies provided in this Act. Actions may be brought by one or more persons for and on behalf of themselves and other persons similarly situated. A person whose rights have been violated under this Act by an employer

or entity is entitled to collect:

(1) the amount of any wages, salary, employment benefits, or other compensation denied or lost to the person by reason of the violation, plus an equal amount in liquidated damages;

(2) compensatory damages and an amount up to \$500 for each violation of this Act or any rule adopted under this Act;

(3) in the case of unlawful retaliation, all legal or equitable relief as may be appropriate; and

(4) attorney's fees and costs.

(b) The right of an interested party or aggrieved person to bring an action under this Section terminates upon the passing of 3 years from the final date of performing services to the employer or entity. This limitations period is tolled if an employer or entity has deterred a person's exercise of rights under this Act.

Section 65. Rulemaking. The Department may adopt reasonable rules to implement and administer this Act. For purposes of this Act, the General Assembly finds that the adoption of rules to implement this Act is deemed an emergency and necessary for the public interest and welfare.

Section 70. No waivers.

(a) There shall be no waiver of any provision of this Act.

(b) It is a Class C misdemeanor for an employer to attempt to induce any individual to waive any provision of this Act.

Section 75. Cooperation. The Department of Labor, the Department of Employment Security, the Department of Revenue, and the Illinois Workers' Compensation Commission shall cooperate under this Act by sharing information concerning any suspected misclassification by an employer or entity of one or more of its employees as independent contractors. Upon determining that an employer or entity has misclassified employees as independent contractors in violation of this Act, the Department shall notify the Department of Employment Security, the Department of Revenue, the Office of the State Comptroller, and the Illinois Workers' Compensation Commission who shall be obliged to check such employer or entity's compliance with their laws, utilizing their own definitions, standards, and procedures.

Section 80. Effect of Final Order. Any finding made pursuant to this Act is for the purpose of enforcing this Act and may not be admissible or binding against a party in any other proceeding.

Section 900. The State Comptroller Act is amended by adding Section 9.06 as follows:

(15 ILCS 405/9.06 new)

Sec. 9.06. Misclassification of employees as independent contractors. The Department of Labor, the Department of Employment Security, the Department of Revenue, the Office of the State Comptroller, and the Illinois Workers' Compensation Commission shall cooperate under the Employee Classification Act by sharing information concerning any suspected misclassification by an employer or entity, as defined in the Employee Classification Act, or one or more employees as independent contractors.

Section 901. The Department of Employment Security Law of the Civil Administrative Code of Illinois is amended by adding Section 1005-160 as follows:

(20 ILCS 1005/1005-160 new)

Sec. 1005-160. Misclassification of employees as independent contractors. The Department of Labor, the Department of Employment Security, the Department of Revenue, the Office of the State Comptroller, and the Illinois Workers' Compensation Commission shall cooperate under the Employee Classification Act by sharing information concerning any suspected misclassification by an employer or entity, as defined in the Employee Classification Act, of one or more employees as independent contractors.

Section 905. The Department of Labor Law of the Civil Administrative Code of Illinois is amended by adding Section 1505-125 as follows:

(20 ILCS 1505/1505-125 new)

Sec. 1505-125. Misclassification of employees as independent contractors. The Department of Labor, the Department of Employment Security, the Department of Revenue, the Office of the State Comptroller and the Illinois Workers' Compensation Commission shall cooperate under the Employee Classification Act by sharing information concerning any suspected misclassification by an employer or entity, as defined in the Employee Classification Act, of one or more employees as independent contractors.

Section 910. The Department of Revenue Law of the Civil Administrative Code of Illinois is amended by adding Section 2505-750 as follows:

(20 ILCS 2505/2505-750 new)

Sec. 2505-750. Misclassification of employees as independent contractors. The Department of Labor, the Department of Employment Security, the Department of Revenue, the Office of the State Comptroller, and the Illinois Workers' Compensation Commission shall cooperate under the Employee Classification Act by sharing information concerning any

suspected misclassification by an employer or entity, as defined in the Employee Classification Act, of one or more employees as independent contractors.

Section 915. The State Finance Act is amended by adding Section 5.675 as follows:

(30 ILCS 105/5.675 new)

Sec. 5.675. The Employee Classification Fund.

Section 920. The Illinois Procurement Code is amended by changing Section 50-70 as follows:

(30 ILCS 500/50-70)

Sec. 50-70. Additional provisions. This Code is subject to applicable provisions of the following Acts:

- (1) Article 33E of the Criminal Code of 1961;
- (2) the Illinois Human Rights Act;
- (3) the Discriminatory Club Act;
- (4) the Illinois Governmental Ethics Act;
- (5) the State Prompt Payment Act;
- (6) the Public Officer Prohibited Activities Act; ~~and~~
- (7) the Drug Free Workplace Act; and-
- (8) the Employee Classification Act.

(Source: P.A. 90-572, eff. 2-6-98.)

Section 925. The Workers' Compensation Act is amended by adding Section 26.1 as follows:

(820 ILCS 305/26.1 new)

Sec. 26.1. Misclassification of employees as independent contractors. The Department of Labor, the Department of Employment Security, the Department of Revenue, the Office of the State Comptroller, and the Illinois Workers' Compensation Commission shall cooperate under the Employee Classification Act by sharing information concerning any suspected misclassification by an employer or entity, as defined in the Employee Classification Act, of one or more employees as independent contractors.

Section 990. Severability. The provisions of this Act are severable under Section 1.31 of the Statute on Statutes.

Section 999. Effective date. This Act takes effect January 1, 2008.

Public Act 095-0026

HB1795 Enrolled

LRB095 08260 RLC 28432 b

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Statutes amended in order of appearance

New Act

15 ILCS 405/9.06 new

20 ILCS 1005/1005-160 new

20 ILCS 1505/1505-125 new

20 ILCS 2505/2505-750 new

30 ILCS 105/5.675 new

30 ILCS 500/50-70

820 ILCS 305/26.1 new