
**Labor & Workplace Standards
Committee**

HB 1515

Brief Description: Concerning the employer-employee relationship.

Sponsors: Representatives Riccelli, Doglio, Frame, Ormsby, Valdez, Stonier, Robinson, Cody, Pellicciotti, Peterson, Tharinger, Fitzgibbon, Sells, Reeves, Pollet and Macri.

Brief Summary of Bill

- Creates the Employee Fair Classification Act, which creates new provisions prohibiting the misclassification of employees as independent contractors and creates remedies, including civil penalties and damages.
- Defines "independent contractor" for purposes of the Employee Fair Classification Act and establishes the same definition for purposes of the Minimum Wage Act, unemployment insurance, industrial insurance, and other employment laws.
- Eliminates the statutory exemption from industrial insurance for taxi drivers and drivers providing commercial transportation services.

Hearing Date: 1/28/19

Staff: Joan Elgee (786-7106).

Background:

Independent Contractor Tests.

Employment standards and benefits generally apply only if an employer-employee relationship exists rather than an independent contractor relationship. Various multipart tests are used to determine whether an individual is an independent contractor. If an employer treats a worker as an independent contractor rather than as an employee, the employer may be liable under the various employment laws.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Prevailing Wage, Industrial Insurance, and Unemployment Insurance. For purposes of prevailing wage, industrial insurance, and unemployment insurance, a six-part statutory independent contractor test is applied. This test requires that:

- the individual has been and will be free from direction and control, both under the contract and in fact;
- the individual's services are outside the usual course of business for which the service is performed, or outside all the places of business, or the individual must pay the costs of the principal place of business where the services are performed;
- the individual has an independently established business, or a principal place of business that qualifies for an Internal Revenue Service (IRS) deduction;
- the individual is responsible for filing a schedule of expenses with the IRS;
- the individual has a separate set of books and records that reflect all items of income and expenses; and
- the individual has an active and valid registration with the Department of Revenue, has a Unified Business Identifier number, and has any other required state accounts for the payment of taxes.

In the construction industry, a seventh required element is that the individual be registered as a contractor or licensed as an electrical contractor. For industrial insurance, a threshold question is whether a person under contract brings more than their personal labor to the job. Under this test, known as the "White" test based on a court decision, if a person brings other employees or equipment other than hand tools, the individual is likely an independent contractor. For unemployment insurance, persons outside construction may also be independent contractors under an alternative three-part test.

Minimum Wage and Other Wage Laws. For purposes of the Minimum Wage Act, which also addresses overtime, a common law economic dependence test applies. The inquiry under this test is whether the worker is economically dependent on the alleged employer or is instead in business for himself or herself. Other wage laws also do not have statutory tests. These include the Wage Payment Act, which provides for an administrative or court action to collect wages under the Minimum Wage Act and other wage laws, as well as establishes other requirements. Other laws address deductions from wages and otherwise address failure to pay wages.

Exemptions from Employment Laws.

The Minimum Wage Act, the industrial insurance laws, and the unemployment insurance laws each have various exemptions. For example, persons doing casual labor in a home are exempt from the Minimum Wage Act, as are commissioned outside sales people. Under industrial insurance, statutory exemptions include taxi drivers and drivers providing commercial transportation services.

General Contractor Liability.

Some employment laws address the liability of general contractors for violations of a subcontractor. For example, for purposes of unemployment insurance and industrial insurance, a general construction contractor is not liable for a subcontractor's taxes under certain circumstances.

Summary of Bill:

Employee Fair Classification Act.

The Employee Fair Classification Act (EFCA) is enacted.

Prohibitions and Requirements.

Certain actions by employers and other persons are prohibited. These are:

- willfully misclassifying an employee as an independent contractor. "Misclassification" is designating an employee as a nonemployee. "Willful" is a knowing and intentional action that is not accidental or the result of a bona fide dispute;
- charging a misclassified employee a fee or making unlawful deductions from compensation;
- requiring or requesting an employee to agree to or sign a document that results in misclassification;
- forming, assisting in, or inducing the formation of a business entity or paying or collecting a fee for the use of a business entity, for the purpose of facilitating or evading detection of a violation of the EFCA; and
- conspiring with, aiding and abetting, assisting, or advising an employer (for remuneration) with the intent of violating the EFCA.

Employers who engage independent contractors must post and provide to each worker a notice stating that a worker has the right to be classified as an employee if the worker does not meet independent contractor requirements, and that a complaint may be filed with the Department of Labor and Industries (Department) or in court if a person believes misclassification has occurred. The notice must be in English, Spanish, and any other language primarily spoken by the majority of the workforce.

Independent contractors, and many of the persons exempt from the Minimum Wage Act are not employees under the EFCA.

Employer-Employee Relationship.

An employer-employee relationship exists when an individual performs labor or services for an employer. Proof that an individual is not an employee must be established by a preponderance of the evidence.

Definition of Employee.

An employee is a person who performs labor or services for an employer, and includes a helper. A helper is an individual engaged by an employee to perform work in the employer's usual course of business. The employer of the employee is the employer of the helper. A person may be an employee of two or more employers at the same time.

Definition of Independent Contractor.

An "independent contractor" is an individual who performs labor or services under a test that is similar to the 6/7 part test:

- the individual is and will continue to be free from control or direction, both under the contract and in fact. Control or direction includes the right to control or direct, as well as general control or direction over, the individual's physical activities;
- the labor or service is outside the usual course of business for which the labor or service is performed;

- the individual is customarily engaged in an independently established trade, occupation, business, or profession that is of the same nature as that involved in the contract and requires the individual to independently establish the price of the labor or service;
- the individual is responsible for filing a schedule of expenses with the IRS;
- the individual has a separate set of books and records that reflect all items of income and expenses;
- the individual has an active and valid registration with the Department of Revenue, has a Unified Business Identifier number, and has any other required state accounts for the payment of taxes; and
- if the individual is performing services as a contractor or electrical contractor, the individual has a valid contractor registration or electrical contractor license.

Acts taken to comply with laws are not proof of independent contractor status.

Enforcement.

Administrative. The Department may investigate violations and for any of the prohibited acts may order payment of:

- a civil penalty of \$1,000 to \$10,000 per employee, or \$10,000 to \$25,000 if the person engaged in a pattern or practice;
- damages of three times the wages and benefits denied or withheld and reimbursement for taxes and the value of benefits paid by the employee. Liability is joint and several for employers and other persons; and
- reimbursement for payroll taxes under industrial insurance and unemployment insurance and the value of other state payroll taxes paid or state benefits lost.

The Department may also order reinstatement and reclassification of the employee, or front pay in lieu of reinstatement. For a notice violation, the Department may order payment of a civil penalty of \$1,000 to \$10,000.

Beginning January 1, 2021, the Department must order penalties. The penalties are adjusted beginning January 1, 2021, and annually thereafter by the consumer price index.

Cause of Action. Individual and class actions are authorized. If the court determines that a person, including an employer, engaged in any of the prohibited acts, the court must order payment of damages of:

- the greater of:
- three times the wages and benefits unlawfully denied or withheld; or
- statutory damages of \$1,000 to \$10,000 per employee or \$10,000 to \$25,000 per employee if a pattern or practice is shown; and
- attorneys' fees and costs.

The court may also order employers and other persons to reimburse the employee for taxes and the value of benefits paid by the employee. Liability is joint and several for employers and other persons. Employers may also be ordered to pay taxes, and may be subject to injunctive or other relief, including reinstatement and reclassification or front pay in lieu of reinstatement.

Other Enforcement Provisions. A three-year statute of limitations for both administrative and court actions is tolled during any period that an employer deterred an action. A "pattern or practice" means that within the previous 10 years, the employer was convicted for nonpayment

of wages or delinquent in payment of a court-ordered or administrative assessment for nonpayment of wages. The Department may decide whether to initiate collection procedures for unpaid industrial insurance premiums and may send its determination to the Employment Security Department.

General Construction Contractor Liability. A general construction contractor is liable for violations of an independent contractor or subcontractor only when the general exerts substantial control over the day-to-day work of the subcontractor or independent contractor.

Implementation.

The Department has rule-making authority and must develop a plan for strategic enforcement of the EFCA, prioritizing industries and workplaces with a high concentration of violations. The EFCA Account (Account) is created. Civil penalties must be deposited into the Account, which is appropriated, and moneys in the Account may be used only for enforcement of the EFCA.

Existing Employment Laws.

The EFCA independent contractor tests apply to prevailing wage, wage deductions, the Wage Payment Act, the Minimum Wage Act, unemployment insurance, and industrial insurance. Existing statutory tests are repealed. In addition, the "White" test for industrial insurance is eliminated. The EFCA provisions on the employer-employee relationship and the definition of employee and employer also apply to these other laws.

The EFCA provisions on general construction contractor liability also apply to wage deductions, the Wage Payment Act, and the Minimum Wage Act.

The statutory exemption from industrial insurance for taxi drivers and drivers providing commercial transportation services is eliminated.

Appropriation: None.

Fiscal Note: Requested on January 28, 2019.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.