

1 State of Arkansas  
2 88th General Assembly  
3 Regular Session, 2011  
4

# A Bill

HOUSE BILL 1325

5 By: Representative Nickels  
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## 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 WORKER'S  
11 COMPENSATION; AN TO INDIRECTLY AMEND THE WORKERS'  
12 COMPENSATION LAW ENACTED BY INITIATED ACT 4 OF 1948;  
13 AND FOR OTHER PURPOSES.  
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## Subtitle

16 AN ACT TO ADDRESS THE PRACTICE OF  
17 MISCLASSIFYING EMPLOYEES AS INDEPENDENT  
18 CONTRACTORS FOR PURPOSES OF WORKER'S  
19 COMPENSATION AND TO INDIRECTLY AMEND  
20 INITIATED ACT 4 OF 1948.  
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24 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:  
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26 SECTION 1. Arkansas Code Title 11, Chapter 3 is amended to add an  
27 additional subchapter to read as follows:

28 Subchapter 5 – Misclassification of Employees under Worker's  
29 Compensation  
30

31 11-3-501. Definitions.

32 As used in this subchapter:

33 (1) "Construction" means erection, reconstruction, demolition,  
34 alteration, modification, custom fabrication, building, assembling, site  
35 preparation, and repair work done on any real property or premises under  
36 contract, whether or not the work is for a public body and paid for from



1 public funds;

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

10 (B) "Employee" does not include an individual who is both  
11 a licensee as defined in § 17-42-103 and a qualified real estate agent as  
12 that term is defined in section 3508(b)(1) of the Internal Revenue Code of  
13 1986, including all regulations under section 3508(b)(1) of the Internal  
14 Revenue Code of 1986.

15 (C) An individual holding from the Workers' Compensation  
16 Commission a current certification of noncoverage under the Workers'  
17 Compensation Law, § 11-9-101 et seq., is conclusively presumed not to be an  
18 employee for purposes of this subchapter or otherwise during the term of his  
19 or her certification or any renewals of his or her certification or until he  
20 or she elects otherwise, whichever time period is shorter; and

21 (3) "Employer" means, with regard to workers' compensation, an  
22 individual, partnership, limited liability company, association, or  
23 corporation carrying on any employment, the receiver or trustee of the same,  
24 or the legal representative of a deceased employer.

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26 11-3-502. Independent contractors.

27 (a) For purposes of workers' compensation and improper classification  
28 of employees under this subchapter, an individual who performs services in  
29 the commercial or residential building construction industry for remuneration  
30 is an independent contractor only if:

31 (1) The individual has a written contract to perform the  
32 services;

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

36 (3) As to the services, the individual is customarily engaged in

1 an independently established trade, occupation, profession, or business.

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

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

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

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

14 (4) The individual maintains a business location that is  
15 separate from the location of the person for whom the services are being  
16 performed;

17 (5) The individual:

18 (A) Previously performed the same or similar services for  
19 another person in accordance with subdivisions (b)(1)-(4) of this section and  
20 while free from direction or control over performance of the services, both  
21 under the contract of service and in fact; or

22 (B) Holds himself or herself out to other persons as  
23 available and able, and in fact is available and able, to perform the same or  
24 similar services in accordance with subdivisions (b)(1)-(4) of this section  
25 while free from direction or control over performance of the services; and

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

28 (c) The failure to withhold federal or state income taxes or pay  
29 workers' compensation premiums with respect to an individual's remuneration  
30 shall not be considered in determining whether the individual is an  
31 independent contractor for purposes of the Workers' Compensation Law, § 11-9-  
32 101 et seq.

33 (d)(1) An individual who is an independent contractor as determined  
34 under this subchapter is not an employee for purposes of the Workers'  
35 Compensation Law, § 11-9-101 et seq.

36 (2) For purposes of this section, each employment relationship

1 shall be considered separately.

2  
3 11-3-503. Improper classification of employees.

4 (a) An employer or an officer or an agent of an employer violates this  
5 subchapter and is subject to the penalties, remedies, and actions contained  
6 in this subchapter if the employer, officer, or agent fails to properly  
7 classify an individual as an employee for purposes of the Workers'  
8 Compensation Law, § 11-9-101 et seq.

9 (b) An employer or an officer or an agent of an employer commits a  
10 separate violation of this section for each individual who is not properly  
11 classified as an employee by the employer or an officer or an agent of an  
12 employer.

13 (c)(1) If the Director of the Department of Labor receives information  
14 indicating that an employer or an officer or an agent of an employer has  
15 violated this subchapter, the director may investigate the matter and issue  
16 an order to show cause why the employer or the officer or the agent of an  
17 employer should not be found in violation of this subchapter.

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

21 (B) If the employer or the officer or the agent of an  
22 employer fails to file a timely and adequate answer to the order to show  
23 cause, the director may give the person notice of a hearing and hold a  
24 hearing on the matter.

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

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

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

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

35 (1) Refer the matter to the office of the Attorney General for  
36 investigation; or

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

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

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

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12           11-3-504. Criminal penalties.

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

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

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

17           (b)(1) An employer or an officer or an agent of an employer, that  
18 negligently fails to properly classify an individual as an employee under §  
19 11-3-503(a) commits a violation and shall upon conviction be sentenced to pay  
20 a fine of not more than one thousand dollars (\$1,000).

21                   (2) Evidence of a prior conviction under subdivision (b)(1) of  
22 this section is admissible as evidence of purpose under subsection (a) of  
23 this section.

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

28                   (2)(A) No person charged with a violation of this subchapter by  
29 the Attorney General shall have standing to challenge the authority of the  
30 Attorney General to prosecute the case.

31                           (B) If a challenge is made under this subsection, the  
32 challenge shall be dismissed and no relief shall be available in the courts  
33 of this state to the person making the challenge.

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35           11-3-505. Administrative penalties.

36           (a) If the Director of the Department of Labor finds that a person has

1 violated this subchapter, the director may assess and collect civil penalties  
2 of not more than one thousand dollars (\$1,000) for the first violation, and  
3 not more than two thousand five hundred dollars (\$2,500) for each subsequent  
4 violation.

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

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

8 (2) The seriousness of the current violations;

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

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

11  
12 11-3-506. Stop-work orders.

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

20 (B) However, if the director determines that a majority of  
21 individuals working at a site have been purposely improperly classified, the  
22 director may petition the court for an order requiring that within twenty-  
23 four (24) hours after the effective date of the order all business operations  
24 of that employer at each site at which a violation occurred cease.

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

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

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

35 (b) A court hearing an action under this section shall assess a  
36 penalty of one thousand dollars (\$1,000) per day against an employer for each

1 day that the employer conducts business operations that are in violation of a  
2 stop-work order issued under this section.

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

9  
10 11-3-507. Administrative procedure.

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

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

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

19  
20 11-3-508. Certain agreements prohibited.

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

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

27 (2) Each violation of subsection (a) of this section is a  
28 separate offense under this section.

29  
30 11-3-509. Retaliation prohibited.

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

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

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

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

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10       11-3-510. Availability of information.

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

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

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18       11-3-511. Use of penalty funds.

19       Any sum collected as a penalty under this subchapter shall be paid into  
20 the Workers' Compensation Fund created in §§ 11-9-301 and 19-5-924.

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22       11-3-512. Rules.

23       The Department of Labor shall adopt rules necessary to implement this  
24 subchapter.

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26       11-3-513. Annual report required.

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

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

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35       11-3-514. Construction of law.

36       (a) This subchapter does not impair or affect in any manner the



1 ability of the Department of Labor and the Director of the Department of  
2 Labor to carry out the powers and duties prescribed by the laws of this  
3 state.

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

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8 11-3-515. Funding limitation.

9 The Department of Labor shall not enforce this subchapter until  
10 adequate funding is available.

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