

SENATE BILL 1005

K3

2lr3124
CF 2lr3221

By: **Senator Pugh**

Introduced and read first time: February 17, 2012

Assigned to: Rules

A BILL ENTITLED

1 AN ACT concerning

2 **Labor and Employment – Determination of Independent Contractor Status –**
3 **Workplace Fraud Act and Unemployment Insurance**

4 FOR the purpose of establishing an exception for an employer that produces certain
5 documents for inspection to the presumption that an employer–employee
6 relationship exists for purposes of the Workplace Fraud Act; repealing the
7 requirement that the Commissioner of Labor and Industry consider certain
8 factors as strong evidence that an employer did not violate a certain provision of
9 law; providing for a presumption, under certain circumstances, that an
10 individual working for remuneration is an independent contractor under certain
11 circumstances; prohibiting the Commissioner, under certain circumstances,
12 from entering a place of business or work site to review and copy certain
13 records; authorizing an employer to comply with a certain requirement to
14 provide records by producing copies of the records; altering the number of days
15 within which an employer is required to produce certain records; repealing a
16 certain provision of law regarding the issuance of citations by the Commissioner
17 for violations of the Workplace Fraud Act; requiring the Commissioner to take
18 certain action regarding an alleged violation of the Workplace Fraud Act within
19 a certain time after the Commissioner receives certain records from an
20 employer; providing that an employer is entitled to a certain hearing within a
21 certain number of days after the hearing is requested unless the right is waived;
22 repealing a certain notification requirement; requiring that a copy of a certain
23 order be submitted to a public body under certain circumstances; altering the
24 requirement that a certain public body withhold certain funds from an
25 employer; repealing the requirement that a certain public body release certain
26 funds on issuance of a certain order; establishing that certain work is not
27 covered employment for the purposes of unemployment insurance if the
28 Secretary of Labor, Licensing, and Regulation is satisfied that the individual
29 performing the work entered into a certain contract with the employer; and
30 generally relating to the determination of independent contractor status.

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.



1 BY repealing and reenacting, with amendments,
 2 Article – Labor and Employment
 3 Section 3–903 through 3–906, 3–913, and 8–205
 4 Annotated Code of Maryland
 5 (2008 Replacement Volume and 2011 Supplement)

6 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
 7 MARYLAND, That the Laws of Maryland read as follows:

8 **Article – Labor and Employment**

9 3–903.

10 (a) An employer may not fail to properly classify an individual who performs
 11 work for remuneration paid by the employer.

12 (b) An employer has failed to properly classify an individual when an
 13 employer–employee relationship exists as determined under subsection (c) of this
 14 section but the employer has not classified the individual as an employee.

15 (c) (1) For purposes of enforcement of this subtitle only, work performed
 16 by an individual for remuneration paid by an employer shall be presumed to create an
 17 employer–employee relationship, unless:

18 (i) the individual is an exempt person; [or]

19 (ii) an employer demonstrates that:

20 1. the individual who performs the work is free from
 21 control and direction over its performance both in fact and under the contract;

22 2. the individual customarily is engaged in an
 23 independent business or occupation of the same nature as that involved in the work;
 24 and

25 3. the work is:

26 A. outside of the usual course of business of the person
 27 for whom the work is performed; or

28 B. performed outside of any place of business of the
 29 person for whom the work is performed; **OR**

30 **(III) AN EMPLOYER PRODUCES FOR INSPECTION BY THE**
 31 **COMMISSIONER:**

1 **1. A WRITTEN CONTRACT, SIGNED BY THE**
2 **EMPLOYER AND THE INDIVIDUAL, THAT:**

3 **A. DESCRIBES THE NATURE OF THE WORK TO BE**
4 **PERFORMED BY THE INDIVIDUAL;**

5 **B. DESCRIBES THE REMUNERATION TO BE PAID FOR**
6 **THE WORK PERFORMED BY THE INDIVIDUAL; AND**

7 **C. INCLUDES AN ACKNOWLEDGEMENT BY THE**
8 **INDIVIDUAL OF THE INDIVIDUAL'S OBLIGATIONS UNDER THIS ARTICLE;**

9 **2. AN AFFIDAVIT SIGNED BY THE INDIVIDUAL**
10 **INDICATING THAT THE INDIVIDUAL IS AN INDEPENDENT CONTRACTOR THAT**
11 **PERFORMS WORK FOR OTHER EMPLOYERS; AND**

12 **3. A CERTIFICATE OF STATUS OF THE INDIVIDUAL'S**
13 **BUSINESS THAT IS ISSUED BY THE STATE DEPARTMENT OF ASSESSMENTS AND**
14 **TAXATION.**

15 (2) Work is outside of the usual course of business of the person for
16 whom it is performed under paragraph (1) of this subsection if:

17 (i) the individual performs the work off the employer's
18 premises;

19 (ii) the individual performs work that is not integrated into the
20 employer's operation; or

21 (iii) the work performed is unrelated to the employer's business.

22 (3) By contract, an employer may engage another business entity,
23 which may have its own employees, to do the same type of work in which the employer
24 engages, at the same location where the employer is working, without establishing an
25 employer–employee relationship between the two contracting entities.

26 (d) The Commissioner shall adopt regulations to explain further and provide
27 specific examples of the application of subsection (c) of this section.

28 3–904.

29 (a) An employer may not knowingly fail to properly classify an individual
30 who performs work for remuneration paid by the employer.

1 (b) An employer has knowingly failed to properly classify an individual
2 when:

3 (1) an employer–employee relationship exists as determined under §
4 3–903(c) of this subtitle; and

5 (2) the employer has knowingly failed to properly classify the
6 individual as an employee.

7 [(c) The Commissioner shall consider, as strong evidence that the employer
8 did not knowingly fail to properly classify an individual, whether:

9 (1) before a complaint was filed against the employer or the
10 Commissioner began an investigation of the employer, the employer:

11 (i) sought and obtained evidence that the individual:

12 1. is an exempt person; or

13 2. as an independent contractor:

14 A. withholds, reports, and remits payroll taxes on behalf
15 of all individuals working for the independent contractor;

16 B. pays unemployment insurance taxes for all
17 individuals working for the independent contractor; and

18 C. maintains workers' compensation insurance; and

19 (ii) provided to the exempt person or independent contractor a
20 written notice as required by § 3–914 of this subtitle; or

21 (2) the employer:

22 (i) 1. classifies all workers who perform the same or
23 substantially the same tasks for the employer as independent contractors; and

24 2. reports the income of the workers to the Internal
25 Revenue Service as required by federal law; and

26 (ii) has received a determination from the Internal Revenue
27 Service that the individual or a worker who performs the same or substantially the
28 same task as the individual is an independent contractor.]

29 (c) IT SHALL BE PRESUMED THAT AN INDIVIDUAL WORKING FOR
30 REMUNERATION IS AN INDEPENDENT CONTRACTOR OF THE EMPLOYER IF,

1 BEFORE A COMPLAINT WAS FILED AGAINST THE EMPLOYER OR THE
2 COMMISSIONER BEGAN AN INVESTIGATION OF THE EMPLOYER, THE EMPLOYER:

3 (1) SOUGHT AND OBTAINED EVIDENCE THAT THE INDIVIDUAL:

4 (I) IS AN EXEMPT PERSON; OR

5 (II) AS AN INDEPENDENT CONTRACTOR:

6 1. WITHHOLDS, REPORTS, AND REMITS PAYROLL
7 TAXES ON BEHALF OF ALL INDIVIDUALS WORKING FOR THE INDEPENDENT
8 CONTRACTOR;

9 2. PAYS UNEMPLOYMENT INSURANCE TAXES FOR
10 ALL INDIVIDUALS WORKING FOR THE INDEPENDENT CONTRACTOR; AND

11 3. MAINTAINS WORKERS' COMPENSATION
12 INSURANCE; AND

13 (2) PROVIDED TO THE INDIVIDUAL A WRITTEN NOTICE AS
14 REQUIRED BY § 3-914 OF THIS SUBTITLE.

15 (d) The Commissioner shall adopt regulations to provide guidance as to what
16 constitutes the evidence relevant to the determination of whether an employer
17 knowingly failed to properly classify an employee.

18 3-905.

19 (a) The Commissioner shall investigate as necessary to determine
20 compliance with this subtitle and regulations adopted under this subtitle.

21 (b) (1) Any written or oral complaint or statement made by a person as
22 part of an investigation under this section is confidential and may not be disclosed
23 without the consent of the person until the investigation is concluded and a citation is
24 issued.

25 (2) Any written or oral statement made by an individual alleged to be
26 employed by the respondent as part of an investigation under this section is
27 confidential and may not be disclosed without the consent of the individual.

28 (c) (1) The Commissioner may enter a place of business or work site to:

29 [(1)] (I) observe work being performed;

1 **[(2)] (II)** interview individuals on the work site, including those
2 identified as employees and independent contractors; and

3 **[(3)] (III) SUBJECT TO PARAGRAPH (2) OF THIS SUBSECTION,**
4 review and copy records.

5 **(2) THE COMMISSIONER MAY NOT ENTER A PLACE OF BUSINESS**
6 **OR WORK SITE TO REVIEW AND COPY RECORDS IF THE EMPLOYER CHOOSES TO**
7 **PROVIDE COPIES OF THE RECORDS TO THE COMMISSIONER FOR REVIEW**
8 **WITHOUT ALLOWING THE COMMISSIONER TO ENTER THE PLACE OF BUSINESS**
9 **OR WORK SITE.**

10 (d) **(1)** The Commissioner may require each employer to:

11 **[(1)] (I) SUBJECT TO PARAGRAPH (2) OF THIS SUBSECTION,**
12 identify and produce all records relevant to the classification of each individual;

13 **[(2)] (II)** attest to the truthfulness of each record that is copied in
14 accordance with **[subsection (c)(3)] SUBSECTION (C)(1)(III)** of this section **OR EACH**
15 **COPY OF A RECORD THAT IS PROVIDED TO THE COMMISSIONER UNDER**
16 **SUBSECTION (C)(2) OF THIS SECTION** and to sign the copy; or

17 **[(3)] (III)** at the option of the employer, submit a written statement
18 about the classification of each employee on the form provided by the Commissioner,
19 with any relevant records attached.

20 **(2) AN EMPLOYER MAY COMPLY WITH A REQUIREMENT TO**
21 **PRODUCE RECORDS UNDER PARAGRAPH (1)(I) OF THIS SUBSECTION BY**
22 **PRODUCING COPIES OF THE RECORDS.**

23 (e) An employer that fails to produce records **OR COPIES OF RECORDS** or a
24 written statement under subsection (d) of this section within **[15] 30** business days
25 after the Commissioner's request shall be subject to a fine not exceeding \$500 per day
26 for each day the records are not produced.

27 (f) **(1)** The Commissioner may issue a subpoena for testimony and the
28 production of records.

29 **(2)** If a person fails to comply with a subpoena issued under this
30 subsection, the Commissioner may file a complaint in the circuit court for the county
31 where the person resides, is employed, or has a place of business, requesting an order
32 directing compliance with the subpoena.

33 3-906.

1 (a) [If, after investigation] **WITHIN 45 DAYS AFTER THE COMMISSIONER**
2 **RECEIVES COPIES OF AN EMPLOYER'S RECORDS OR INSPECTS AN EMPLOYER'S**
3 **RECORDS, the Commissioner [determines] SHALL:**

4 (1) **MAKE A DETERMINATION** that [an] **THE** employer has violated
5 this subtitle or a regulation adopted under this subtitle[, the Commissioner shall
6 promptly] **AND** issue a citation to the employer; **OR**

7 (2) **CLOSE THE CASE.**

8 (b) [Each] **A citation ISSUED UNDER SUBSECTION (A) OF THIS SECTION**
9 shall:

10 (1) describe in detail the nature of the alleged violation;

11 (2) cite the provision of this subtitle or any regulation that the
12 employer is alleged to have violated; and

13 (3) state the civil penalty, if any, that the Commissioner proposes to
14 assess.

15 (c) Within a reasonable time after issuance of a citation, the Commissioner
16 shall send by certified mail to the employer:

17 (1) a copy of the citation; and

18 (2) notice of the opportunity to request a hearing.

19 (d) Within 15 days after an employer receives a notice under subsection (c) of
20 this section, the employer may submit a written request for a hearing on the citation
21 and proposed penalty.

22 (e) If a hearing is not requested within 15 days, the citation, including any
23 penalties, shall become a final order of the Commissioner.

24 (f) (1) If the employer requests a hearing, the Commissioner shall
25 delegate to the Office of Administrative Hearings the authority to hold a hearing and
26 issue findings of fact, conclusions of law, and an order, and assess a penalty under §
27 3-909 of this subtitle in accordance with Title 10, Subtitle 2 of the State Government
28 Article.

29 (2) **IF THE EMPLOYER REQUESTS A HEARING, THE EMPLOYER IS**
30 **ENTITLED TO A HEARING WITHIN 90 DAYS AFTER THE REQUEST IS SUBMITTED**
31 **UNDER SUBSECTION (D) OF THIS SECTION UNLESS THE RIGHT IS WAIVED.**

1 (g) Within 15 days after a request, in accordance with Title 10, Subtitle 6 of
2 the State Government Article and the applicable regulations of the Department and
3 the Office of Administrative Hearings, the Commissioner shall provide copies of all
4 relevant evidence, including a list of potential witnesses, on which the Commissioner
5 intends to rely at any administrative hearing under this subtitle.

6 (h) The Commissioner has the burden of proof to show that an employer has
7 knowingly failed to properly classify an individual as an employee.

8 (i) A decision of an administrative law judge issued in accordance with Title
9 10, Subtitle 2 of the State Government Article shall become a final order of the
10 Commissioner.

11 (j) Any party aggrieved by a final order of the Commissioner under
12 subsection (i) of this section may seek judicial review and appeal under §§ 10–222 and
13 10–223 of the State Government Article.

14 3–913.

15 (a) [Where, after investigation, the Commissioner issues a citation for a
16 violation of this subtitle or regulations adopted under this subtitle by an employer
17 engaged in work on a contract with a public body, the Commissioner shall promptly
18 notify the public body.] **IF A COURT OR AN ADMINISTRATIVE UNIT FINDS A
19 VIOLATION OF THIS SUBTITLE BY AN EMPLOYER ENGAGED IN WORK ON A
20 CONTRACT WITH A PUBLIC BODY, A COPY OF THE FINAL ORDER ISSUED BY THE
21 COURT OR ADMINISTRATIVE UNIT SHALL BE SUBMITTED TO THE PUBLIC BODY.**

22 (b) (1) On [notification,] **RECEIPT OF A COPY OF A FINAL ORDER
23 SUBMITTED TO A PUBLIC BODY UNDER SUBSECTION (A) OF THIS SECTION,** the
24 public body shall withhold from payment due the employer an amount that is
25 sufficient to:

26 (i) pay restitution to each employee for the full amount of
27 wages due; and

28 (ii) pay any benefits, taxes, or other contributions that are
29 required by law to be paid on behalf of the employee.

30 (2) The public body shall release[:

31 (i) on issuance of a favorable final order of a court or an
32 administrative unit, the full amount of the withheld funds; and

33 (ii) on an adverse final order of a court or an administrative
34 unit,] the balance of the withheld funds after all obligations are satisfied under
35 paragraph (1) of this subsection.

1 8-205.

2 (a) Work that an individual performs under any contract of hire is not
3 covered employment if the Secretary is satisfied that:

4 (1) (I) the individual who performs the work is free from control
5 and direction over its performance both in fact and under the contract;

6 [(2)] (II) the individual customarily is engaged in an independent
7 business or occupation of the same nature as that involved in the work; and

8 [(3)] (III) the work is:

9 [(i)] 1. outside of the usual course of business of the person
10 for whom the work is performed; or

11 [(ii)] 2. performed outside of any place of business of the
12 person for whom the work is performed; OR

13 (2) THE INDIVIDUAL WHO PERFORMS THE WORK HAS ENTERED
14 INTO A WRITTEN CONTRACT THAT STATES EXPRESSLY AND PROMINENTLY THAT
15 THE INDIVIDUAL KNOWS AND UNDERSTANDS THAT:

16 (I) THE INDIVIDUAL IS RESPONSIBLE FOR PAYING
17 ESTIMATED SOCIAL SECURITY TAXES FOR SELF-EMPLOYMENT AND FOR PAYING
18 STATE AND FEDERAL INCOME TAXES; AND

19 (II) THE WORK IS NOT COVERED EMPLOYMENT AND THE
20 INDIVIDUAL IS RESPONSIBLE FOR COMPLIANCE WITH TITLES 8 AND 9 OF THIS
21 ARTICLE.

22 (b) The Secretary shall adopt regulations to provide:

23 (1) general guidance about the application of subsection (a) of this
24 section; and

25 (2) specific examples of how subsection (a) of this section is applied to
26 certain industries, including the construction industry, the landscaping industry, and
27 the home care services industry.

28 SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect
29 October 1, 2012.