

CHAPTER 406

LABOR AND INDUSTRY

HOUSE BILL 09-1310

BY REPRESENTATIVE(S) Levy, Apuan, Court, McCann, Pace, Ryden, Casso, Fischer, Frangas, Gagliardi, Green, Merrifield, Middleton, Scanlan, Soper, Labuda, Todd;
also SENATOR(S) Heath, Carroll M., Groff, Shaffer B.

AN ACT

CONCERNING THE MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS FOR PURPOSES OF THE "COLORADO EMPLOYMENT SECURITY ACT", AND MAKING AN APPROPRIATION THEREFOR.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Article 72 of title 8, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

8-72-114. Employee misclassification - investigations - enforcement - advisory opinions - rules - employee misclassification advisory opinion fund - statewide study - report - definitions - legislative declaration - repeal. (1) THE GENERAL ASSEMBLY HEREBY FINDS AND DECLARES THAT:

(a) MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS IN VIOLATION OF THE "COLORADO EMPLOYMENT SECURITY ACT" AND, IN PARTICULAR, THE PROVISIONS OF ARTICLE 70 OF THIS TITLE DEFINING THE EMPLOYMENT RELATIONSHIP, MAY POSE A SIGNIFICANT PROBLEM IN THIS STATE AND LEADS TO UNDERPAYMENT OF EMPLOYMENT TAXES THAT EMPLOYERS ARE OBLIGATED TO PAY THE STATE FOR COVERED EMPLOYMENT.

(b) BUSINESSES THAT MISCLASSIFY EMPLOYEES GAIN AN UNFAIR COMPETITIVE ADVANTAGE OVER BUSINESSES THAT PROPERLY CLASSIFY EMPLOYEES AND PAY APPROPRIATE TAXES TO THE STATE.

(c) WHEN EMPLOYEES ARE MISCLASSIFIED, THE PROTECTIONS AVAILABLE TO PROPERLY CLASSIFIED EMPLOYEES AGAINST ECONOMIC INSECURITY ARE UNAVAILABLE TO THOSE MISCLASSIFIED EMPLOYEES, AND THE STREAM OF REVENUE

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

THAT SHOULD BE PAID TO THE STATE TO PROVIDE PROTECTIONS TO MISCLASSIFIED EMPLOYEES IS NOT AVAILABLE.

(2) AS USED IN THIS SECTION:

(a) "ACT" MEANS THE "COLORADO EMPLOYMENT SECURITY ACT".

(b) "COMPLAINANT" MEANS THE PERSON WHO FILES A COMPLAINT WITH THE DIVISION PURSUANT TO THIS SECTION.

(c) "DIRECTOR" MEANS THE DIRECTOR OF THE DIVISION OF EMPLOYMENT AND TRAINING IN THE DEPARTMENT OF LABOR AND EMPLOYMENT.

(d) "DIVISION" MEANS THE DIVISION OF EMPLOYMENT AND TRAINING IN THE DEPARTMENT OF LABOR AND EMPLOYMENT.

(e) "EXECUTIVE DIRECTOR" MEANS THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF LABOR AND EMPLOYMENT.

(f) "MISCLASSIFICATION OF EMPLOYEES" MEANS ERRONEOUSLY CLASSIFYING A PERSON AS AN INDEPENDENT CONTRACTOR, FREE FROM CONTROL AND DIRECTION OF THE EMPLOYER IN THE PERFORMANCE OF SERVICE FOR THE EMPLOYER, WHEN THE EMPLOYER CANNOT SHOW AN EXCEPTION, PURSUANT TO SECTION 8-70-103 (11), TO THE GENERAL RULE THAT SERVICE BEING PERFORMED FOR THE EMPLOYER IS PRESUMED TO BE EMPLOYMENT FOR PURPOSES OF THE ACT.

(g) "RESPONDENT" MEANS THE PERSON AGAINST WHOM A COMPLAINT IS FILED PURSUANT TO THIS SECTION.

(3)(a) THE DIVISION SHALL BE RESPONSIBLE FOR ACCEPTING AND INVESTIGATING COMPLAINTS REGARDING MISCLASSIFICATION OF EMPLOYEES AND ENFORCING THE REQUIREMENTS OF THE ACT REGARDING CLASSIFICATION OF EMPLOYEES AND PAYMENT OF TAXES.

(b) ANY PERSON MAY FILE A WRITTEN COMPLAINT WITH THE DIVISION ALLEGING THAT A PERSON ENGAGED IN EMPLOYMENT IS BEING MISCLASSIFIED BY AN EMPLOYER AS AN INDEPENDENT CONTRACTOR. THE COMPLAINANT SHALL SPECIFY IN THE COMPLAINT THE FACTS SHOWING THAT THE PERSON CLASSIFIED AS AN INDEPENDENT CONTRACTOR IS ENGAGED IN EMPLOYMENT, AS DEFINED IN ARTICLE 70 OF THIS TITLE.

(c) THE DIRECTOR MAY INVESTIGATE A COMPLAINT FILED PURSUANT TO THIS SUBSECTION (3) AND SHALL FOCUS ON THE INVESTIGATION OF THE MOST EGREGIOUS COMPLAINTS OR THOSE COMPLAINTS ALLEGING INTENTIONAL ACTS OF MISCLASSIFICATION OF EMPLOYEES UNDERTAKEN IN ORDER TO GAIN A COMPETITIVE ADVANTAGE OR TO AVOID THE PAYMENT OF TAXES.

(d) NO LATER THAN THIRTY DAYS AFTER RECEIPT OF A COMPLAINT, THE DIRECTOR SHALL DETERMINE WHETHER OR NOT AN INVESTIGATION IS WARRANTED. IF THE DIRECTOR DETERMINES THAT AN INVESTIGATION IS WARRANTED, THE DIRECTOR SHALL NOTIFY THE COMPLAINANT AND RESPONDENT THAT AN INVESTIGATION WILL BE CONDUCTED AND SHALL CONDUCT THE INVESTIGATION IN ACCORDANCE WITH THE

ACT. THE RULES ADOPTED PURSUANT TO THE ACT, AND THE COMPLAINANT AND RESPONDENT SHALL COOPERATE AND PROVIDE INFORMATION AS NECESSARY TO FACILITATE THE INVESTIGATION.

(e) (I) UPON CONCLUSION OF AN INVESTIGATION, THE DIRECTOR SHALL ISSUE A WRITTEN ORDER EITHER DISMISSING THE COMPLAINT OR FINDING THAT THE EMPLOYER HAS ENGAGED IN THE MISCLASSIFICATION OF EMPLOYEES AND HAS FAILED TO PAY APPROPRIATE TAXES FOR COVERED EMPLOYMENT AS DEFINED IN ARTICLE 70 OF THIS TITLE.

(II) IF THE DIRECTOR FINDS THAT AN EMPLOYER HAS ENGAGED IN THE MISCLASSIFICATION OF EMPLOYEES, THE DIRECTOR SHALL ORDER THE EMPLOYER TO PAY BACK TAXES OWED AND INTEREST.

(III) UPON A FINDING THAT THE EMPLOYER, WITH WILLFUL DISREGARD OF THE LAW, MISCLASSIFIED EMPLOYEES, THE DIRECTOR MAY:

(A) IMPOSE A FINE OF UP TO FIVE THOUSAND DOLLARS PER MISCLASSIFIED EMPLOYEE FOR THE FIRST MISCLASSIFICATION WITH WILLFUL DISREGARD, AND FOR A SECOND OR SUBSEQUENT MISCLASSIFICATION WITH WILLFUL DISREGARD, A FINE OF UP TO TWENTY-FIVE THOUSAND DOLLARS PER MISCLASSIFIED EMPLOYEE; AND

(B) UPON A SECOND OR SUBSEQUENT MISCLASSIFICATION WITH WILLFUL DISREGARD, ISSUE AN ORDER PROHIBITING THE EMPLOYER FROM CONTRACTING WITH, OR RECEIVING ANY FUNDS FOR THE PERFORMANCE OF CONTRACTS FROM, THE STATE FOR UP TO TWO YEARS AFTER THE DATE OF THE DIRECTOR'S ORDER. UPON THE ISSUANCE OF SUCH ORDER, THE DIRECTOR SHALL NOTIFY STATE DEPARTMENTS AND AGENCIES AS NECESSARY TO ENSURE ENFORCEMENT OF THE ORDER.

(f) THE DIRECTOR SHALL PROVIDE A COPY OF THE WRITTEN ORDER TO THE RESPONDENT. THOSE PORTIONS OF THE WRITTEN ORDER THAT ARE NOT CONFIDENTIAL UNDER THE ACT SHALL BE A PUBLIC RECORD.

(g) AN EMPLOYER SHALL HAVE THE RIGHT TO APPEAL THE DIRECTOR'S ORDER IN ACCORDANCE WITH SECTION 8-76-113.

(4) (a) AN EMPLOYER MAY REQUEST A WRITTEN ADVISORY OPINION FROM THE DIRECTOR CONCERNING WHETHER THE EMPLOYER SHOULD CLASSIFY THE INDIVIDUAL AS AN EMPLOYEE FOR PURPOSES OF COMPLYING WITH THE ACT. THE EMPLOYER SHALL PROVIDE THE DIRECTOR WITH INFORMATION NECESSARY FOR THE DIRECTOR TO ISSUE AN ADVISORY OPINION.

(b) UPON RECEIPT OF A REQUEST AND PERTINENT INFORMATION FROM AN EMPLOYER, THE DIRECTOR SHALL ISSUE AN ADVISORY OPINION TO THE EMPLOYER, INDICATING WHETHER THE EMPLOYER SHOULD CLASSIFY THE INDIVIDUAL AS AN EMPLOYEE IN ORDER TO COMPLY WITH THE ACT. AN OPINION ISSUED PURSUANT TO THIS SUBSECTION (4) IS ONLY ADVISORY, BASED ON THE INFORMATION PROVIDED BY THE EMPLOYER AND THE DIRECTOR'S UNDERSTANDING OF THE CIRCUMSTANCES AT THE TIME ISSUED, AND IS NOT BINDING ON THE DIVISION, THE EMPLOYER, OR ANY OTHER STATE OR LOCAL GOVERNMENTAL ENTITY.

(c) THE DIRECTOR SHALL PROMULGATE RULES IN ACCORDANCE WITH ARTICLE 4 OF TITLE 24, C.R.S., ESTABLISHING THE PROCESS FOR ISSUING AN ADVISORY OPINION AND THE FEES TO BE CHARGED THE REQUESTING EMPLOYER TO COVER THE DIRECTOR'S AND DIVISION'S COSTS IN PROVIDING THE ADVISORY OPINION. ANY FEES CHARGED PURSUANT TO THIS SUBSECTION (4) FOR THE COSTS ASSOCIATED WITH ISSUING AN ADVISORY OPINION SHALL BE DEPOSITED IN THE EMPLOYEE MISCLASSIFICATION ADVISORY OPINION FUND, WHICH FUND IS HEREBY CREATED. MONEYS IN THE EMPLOYEE MISCLASSIFICATION ADVISORY OPINION FUND SHALL BE SUBJECT TO ANNUAL APPROPRIATION BY THE GENERAL ASSEMBLY FOR THE PURPOSES OF THIS SUBSECTION (4). INTEREST DERIVED FROM THE DEPOSIT AND INVESTMENT OF MONEYS IN THE FUND SHALL BE CREDITED TO THE FUND. AT THE END OF ANY FISCAL YEAR, ALL UNEXPENDED AND UNENCUMBERED MONEYS IN THE FUND SHALL REMAIN IN THE FUND AND SHALL NOT BE CREDITED OR TRANSFERRED TO THE GENERAL FUND OR ANY OTHER FUND.

(5) THE DIRECTOR, BY ALL MEANS REASONABLE AND WITHIN BUDGETARY CONSTRAINTS, SHALL PUBLICIZE THE COMPLAINT PROCESS ESTABLISHED IN THIS SECTION AND ITS AVAILABILITY TO THOSE WHO HAVE DISCOVERED MISCLASSIFICATION OF EMPLOYEES. THE DIRECTOR SHALL DEVELOP AND MAKE AVAILABLE FREE OF CHARGE TO EMPLOYERS A NOTICE EXPLAINING THE RIGHTS OF EMPLOYEES TO BE PROPERLY CLASSIFIED AND THE AVAILABILITY OF A COMPLAINT PROCESS PURSUANT TO THIS SECTION. EMPLOYERS SHALL POST THE NOTICE CONSPICUOUSLY IN THE WORKPLACE OR OTHERWISE WHERE IT CAN BE SEEN AS EMPLOYEES COME OR GO TO THEIR PLACES OF WORK.

(6) (a) THE EXECUTIVE DIRECTOR SHALL CONDUCT A STATEWIDE STUDY OF THE ISSUE OF EMPLOYEE MISCLASSIFICATION, WHICH SHALL INCLUDE, WITHOUT LIMITATION, THE FOLLOWING INFORMATION:

(I) THE STATE DEPARTMENTS, DIVISIONS, AND AGENCIES THAT ARE AFFECTED BY EMPLOYEE MISCLASSIFICATION;

(II) THE AMOUNT OF STATE REVENUE THAT IS LOST OR NOT COLLECTED DUE TO THE MISCLASSIFICATION OF EMPLOYEES;

(III) ESTIMATES OF HOW WIDESPREAD THE PROBLEM OF EMPLOYEE MISCLASSIFICATION IS AND WHETHER PARTICULAR INDUSTRIES ARE MORE LIKELY TO ENGAGE IN THE MISCLASSIFICATION OF EMPLOYEES;

(IV) CONSIDERATION OF WHETHER STATE LAW SHOULD SPECIFY A UNIFORM DEFINITION OF THE EMPLOYMENT RELATIONSHIP AND, IF SO, HOW IT SHOULD BE DEFINED; AND

(V) ANY OTHER ISSUES THE EXECUTIVE DIRECTOR DETERMINES APPROPRIATE.

(b) THE EXECUTIVE DIRECTOR SHALL DEVOTE DEPARTMENT RESOURCES AS NECESSARY TO COMPLETE THE STATEWIDE STUDY.

(c) THE EXECUTIVE DIRECTOR SHALL SEEK PUBLIC INPUT AND MAY CONDUCT PUBLIC HEARINGS OR APPOINT STUDY GROUPS AS NECESSARY TO OBTAIN INFORMATION NECESSARY TO COMPLETE THE STUDY.

(7) NO LATER THAN TWO YEARS AFTER THE EFFECTIVE DATE OF THIS SECTION, THE EXECUTIVE DIRECTOR SHALL SUBMIT A REPORT ON THE STATEWIDE STUDY CONDUCTED PURSUANT TO SUBSECTION (6) OF THIS SECTION TO THE BUSINESS, LABOR, AND TECHNOLOGY COMMITTEE OF THE SENATE AND THE BUSINESS AFFAIRS AND LABOR COMMITTEE OF THE HOUSE OF REPRESENTATIVES, OR THEIR SUCCESSOR COMMITTEES. THE REPORT SHALL ALSO INCLUDE INFORMATION ON THE OPERATION OF THE DIVISION TO INVESTIGATE COMPLAINTS OF EMPLOYEE MISCLASSIFICATION AND ENFORCE THIS SECTION, SPECIFYING AT LEAST THE FOLLOWING:

(a) THE NUMBER OF COMPLAINTS SUBMITTED TO THE DIVISION PURSUANT TO THIS SECTION;

(b) THE NUMBER OF COMPLAINTS THAT WERE INVESTIGATED BY THE DIRECTOR;

(c) THE OUTCOME OF THE COMPLAINTS THAT WERE INVESTIGATED, INCLUDING WHETHER ANY EMPLOYERS WERE FOUND TO HAVE MISCLASSIFIED EMPLOYEES AND THE AMOUNT OF TAXES, INTEREST, OR FINES IMPOSED AGAINST SUCH EMPLOYERS;

(d) A RECOMMENDATION REGARDING WHETHER THE DIVISION'S FUNCTIONS PURSUANT TO THIS SECTION SHOULD BE CONTINUED, MODIFIED, OR REPEALED; AND

(e) ANY OTHER ISSUES OR INFORMATION THE EXECUTIVE DIRECTOR DEEMS APPROPRIATE.

(8) SUBSECTIONS (6) AND (7) OF THIS SECTION AND THIS SUBSECTION (8) ARE REPEALED, EFFECTIVE JULY 1, 2012.

SECTION 2. Appropriation. (1) In addition to any other appropriation, there is hereby appropriated, out of any moneys in the unemployment revenue fund created in section 8-77-106 (1), Colorado Revised Statutes, not otherwise appropriated, to the department of labor and employment, for allocation to the division of employment and training, for the fiscal year beginning July 1, 2009, the sum of nine hundred seventy-five dollars (\$975) cash funds, or so much thereof as may be necessary, for the implementation of this act.

(2) In addition to any other appropriation, there is hereby appropriated, out of any moneys in the employee misclassification advisory opinion fund created in section 8-72-114 (4) (c), Colorado Revised Statutes, not otherwise appropriated, to the department of labor and employment, for allocation to the division of employment and training, for the fiscal year beginning July 1, 2009, the sum of nine thousand eight hundred forty dollars (\$9,840) cash funds and 0.2 FTE, or so much thereof as may be necessary, for the implementation of this act.

SECTION 3. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: June 2, 2009