



UPDATED VERSION*

Ohio Legislative Service Commission

Bill Analysis

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Am. H.B. 523

128th General Assembly

(As Reported by H. Commerce and Labor)

Reps. Phillips and Driehaus, Patten, Murray, Weddington, Letson, Hagan, Szollosi, Brown, Okey, Domenick, Dodd, Walter, Pillich, Garland, Skindell, Foley

BILL SUMMARY

Overview of the bill

- Creates a generally uniform definition of "employee" for purposes of the portions of the Minimum Fair Wage Standards Law that govern the payment of the minimum wage, the Bimonthly Pay Law, the Prevailing Wage Law, the Workers' Compensation Law, the Unemployment Compensation Law, and the Income Tax Law.

Changes to existing law definitions of "employee"

- Replaces the definition of "employee" in the Minimum Fair Wage Standards Law and the Industrial Commission and Bureau of Workers' Compensation Law with the definition of employee created under the bill.
- Adds the definition of "employee" created under the bill to the Bimonthly Pay Law, the Prevailing Wage Law, the Unemployment Compensation Law, and the Income Tax Law.
- Modifies the existing law definition of "employee" for purposes of the Workers' Compensation Law.
- Removes the ability of an individual incorporated as a corporation to elect to obtain workers' compensation coverage.

* The legislative history was updated.

- Expands the definition of "employment" for the purposes of the Unemployment Compensation Law as it relates to services provided by delivery drivers and specified salespersons.
- Removes the exemption from the definition of "employment" for the purposes of the Unemployment Compensation Law concerning specified services performed by an individual on a commission basis.
- Removes from the Workers' Compensation Law and the Unemployment Compensation Law the 20-factor test used to determine whether an individual providing construction services is an employee for purposes of those laws.

Classification of individuals as "employees"

- Prohibits an employer from failing to designate an individual who performs services for the employer as an employee unless the conditions described in the definition of employee created under the bill apply to that individual.
- Prohibits an employer from retaliating against an individual who takes specified actions listed in the bill.
- Prohibits an employer from attempting to cause or causing an individual to waive the provisions of the bill or to enter into a predispute waiver.
- Prohibits any person from requiring or requesting an individual to enter into an agreement or sign a document that results in the misclassification of the individual as an independent contractor or otherwise does not accurately reflect the individual's relationship with an employer.
- Creates criminal and civil penalties for whoever violates any of the bill's prohibitions, and doubles the civil penalties if the employer knowingly committed the violation.
- Requires the Director of Commerce to administer and enforce the bill.
- Requires the Director of Commerce, the Director of Job and Family Services, the Tax Commissioner, and the Administrator of Workers' Compensation to share information concerning any suspected misclassification by an employer.
- Makes the determination made by the Director of Commerce that an employer has misclassified an employee as an independent contractor binding on the Director of Job and Family Services, the Tax Commissioner, and the Administrator unless the individual is otherwise not considered an employee under the applicable law but

states, however, that nothing in the bill is to be construed to limit or otherwise constrain the duties or powers of those persons under the applicable law.

- Makes a contractor or subcontractor liable for the failure of a subcontractor or lower tier subcontractor to properly classify an individual as an employee.
- Prohibits any state agency from entering into a contract with an employer included in the list of employers that have violated the bill's prohibitions multiple times for a period of four years after the date of the employer's most recent violation.
- Permits an aggrieved party, as defined by the bill, to file suit against an employer without regard to exhaustion of any alternative administrative remedies provided in the bill.
- Allows an aggrieved party to file an action to recover civil penalties assessed by the Director against an employer.
- Requires the Director to create a summary of the requirements of the bill and requires an employer, if the employer engages an individual to perform services and that individual is not considered an employee, to post and keep posted, in a conspicuous place on each job site where that individual performs services and in each of the employer's offices, the notice prepared by the Director.
- Creates the Employee Classification Fund, and requires the Director to use the Fund to administer and enforce the bill.

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CONTENT AND OPERATION

Overview of the bill--definition of "employee"

The bill creates a generally uniform definition of "employee" for purposes of the portions of the Minimum Fair Wage Standards Law (R.C. Chapter 4111.) that govern the payment of the minimum wage, the Bimonthly Pay Law (R.C. 4113.15 and 4113.16), the Prevailing Wage Law (R.C. 4115.03 to 4115.21 and 4115.99), the Workers' Compensation Law (R.C. Chapters 4121., 4123., 4127., and 4131.), the Unemployment Compensation Law (R.C. Chapter 4141.), and the Income Tax Law (R.C. Chapter 5747.). Except as otherwise specified below, "employee" under the bill means an individual who performs services for compensation for an employer. "Employee" does not mean an individual who performs services for an employer and to whom all of the following conditions apply:

(1) The individual has been and continues to be free from control and direction in connection with the performance of the service.

(2) The individual customarily is engaged in an independently established trade, occupation, profession, or business of the same nature of the trade, occupation, profession, or business involved in the service performed.

(3) The individual is a separate and distinct business entity from the entity for which the service is being performed or, if the individual is providing construction services and is a sole proprietorship or partnership, the individual is a legitimate sole proprietorship or a partner in a legitimate partnership to which the provisions described under "**Legitimate sole proprietorship or partnership**" below, as applicable.

(4) The individual incurs the main expenses and has continuing or recurring business liabilities related to the service performed.

(5) The individual is liable for breach of contract for failure to complete the service.

(6) An agreement, written or oral, express or implied, exists describing the service to be performed, the payment the individual will receive for performance of the service, and the time frame for completion of the service.

(7) The service performed by the individual is outside of the usual course of business of the employer. (R.C. 4175.01(D).)

For purposes of the bill, "employer" means any person, the state, any agency or instrumentality of the state, and any municipal corporation, county, township, school district, or other political subdivision or any agency or instrumentality thereof that engages an individual to perform services (R.C. 4175.01(E)). The bill, however, does not change the definition of "employer" found in each of the laws listed above.

Under the bill, for purposes of the Unemployment Compensation Law, "employee" has the same meaning as described above, unless the services performed by the individual do not constitute "employment" as defined in the Unemployment Compensation Law (see "**Other labor and employment laws**" below) (R.C. 4141.01(EE)). Under the Income Tax Law, "employee" has the same meaning as described above unless the Internal Revenue Service has accepted the classification of an individual as an independent contractor made by the individual and the individual's payer (R.C. 5747.01(GG)).

Legitimate sole proprietorship or partnership

Under the bill, an employer and the Director of Commerce must consider a sole proprietorship or partnership that performs construction services for the employer to be a legitimate sole proprietorship or a legitimate partnership if the employer demonstrates all of the following:

(1) The sole proprietorship or partnership performs the construction service free from the direction or control of the employer over the means and manner of providing the service, subject only to the right of the employer for whom the service is provided to specify the desired result.

(2) The sole proprietorship or partnership is not subject to cancellation or destruction upon severance of the relationship with the employer.

(3) The owner of the sole proprietorship or the partners in the partnership have a substantial investment of capital in the sole proprietorship or partnership beyond ordinary tools and equipment and a personal vehicle.

(4) The sole proprietorship or partnership owns the capital goods, gains the profits, and bears the losses of the sole proprietorship or partnership.

(5) The sole proprietorship or partnership makes its construction services available to the general public or the business community on a continuing basis.

(6) The sole proprietorship or partnership reported a profit or loss or earnings from self-employment on the sole proprietorship or partnership's federal income tax schedule.

(7) The sole proprietorship or partnership performs construction services for the employer under the name of the sole proprietorship or partnership.

(8) If the construction services the sole proprietorship or partnership provides to the employer require a license or permit in order to provide those services, the sole proprietorship or partnership obtains the appropriate license or permit in the name of the sole proprietorship or partnership name and directly pays for the appropriate license or permit.

(9) The sole proprietorship or partnership furnishes the tools and equipment necessary for the sole proprietorship or partnership to provide the construction service for the employer.

(10) If necessary, the sole proprietorship or partnership hires its own employees without obtaining approval from the employer, pays those employees without direct reimbursement from the employer, and reports the employees' income to the Internal Revenue Service.

(11) The employer does not represent the sole proprietorship or the partners of the partnership as an employee of the employer to the employer's customers.

(12) The sole proprietorship or partnership performs similar construction services for others on whatever basis and whenever the sole proprietorship or partnership chooses. (R.C. 4175.04(A) to (L).)

If the Director, using the factors listed in (1) to (12) above, determines that a sole proprietorship or partnership performing construction services for an employer is not a legitimate sole proprietorship or a legitimate partnership, the Director must consider the owner of the sole proprietorship, each partner of the partnership, and each of the employees of the sole proprietorship or partnership, as applicable, as an employee of the employer for the purposes of the bill (R.C. 4175.04).

Current definition of "employee" under specified labor laws

Minimum Fair Wage Standards Law

Section 34a, Article II, of the Ohio Constitution (Section 34a) requires employers to pay employees at least the minimum wage. Under Section 34a, "employee" has the same meaning as under the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C. 203, as amended, except that "employee" does not include an individual employed in or about the property of the employer or individual's residence on a casual basis. Section 34a expressly allows laws to be passed to expand its coverage. (Section 34a.) (See **COMMENT.**)

Ohio's Minimum Fair Wage Standards Law (R.C. Chapter 4111.; MFWS) implements Section 34a. Under current law, the MFWS defines "employee," for purposes of the minimum wage requirements, as having the same meaning as in the FLSA, except that in construing the meaning of the term, due consideration and great weight must be given to the U.S. Department of Labor's and federal courts' interpretations of those terms under the FLSA and its regulations (R.C. 4111.02 and 4111.14(B)). Additionally, "employee" means individuals employed in Ohio, but does not mean individuals who are excluded from the definition of "employee" under the FLSA (29 U.S.C. 203(e)) or individuals who are exempted from the minimum wage requirements in the FLSA (see 29 U.S.C. 213) and from the definition of "employee" in the MFWS.¹ Under the MFWS "employee" does not include any person acting as a volunteer. "Volunteer" has the same meaning as in 29 C.F.R. 553.101 to 553.106, as amended, and due consideration and great weight must be given to the U.S. Department of Labor's and federal courts' interpretations of the term "volunteer" under the FLSA and its regulations. (R.C. 4111.14(B)(1) and (2).)

The bill expands the definition of "employee" for the MFWS to the definition of "employee" described under "**Overview of the bill--definition of "employee"**" above and removes the requirement that due consideration and great weight must be given to the U.S. Department of Labor's and federal courts' interpretations of the term "employee" under the FLSA and its regulations (R.C. 4111.02 and 4111.14(B)). Because, under the bill, an individual must receive compensation for the services provided to be considered an employee, the exception for volunteers under MFWS appears to be unnecessary and the bill removes the exception.

¹ MFWS also governs the requirements to pay overtime for Ohio employees. The overtime provision has a definition of "employee" that differs from the definition used for minimum wage purposes (see R.C. 4111.03, not in the bill). The definition of "employee" used for overtime purposes is unchanged by the bill.

In accordance with Section 34a, under the current MFWS "independent contractor" has the same meaning as in the FLSA. The bill removes this definition. However, because "independent contractor," is not specifically defined in the FLSA, its current definition, and the effect of change made by the bill, is unclear. (R.C. 4111.14(B).)

Ohio's Workers' Compensation Law

Ohio's Workers' Compensation Law (R.C. Chapters 4121., 4123., 4127., and 4131.) contains two separate definitions of "employee." Currently, under the Industrial Commission and Bureau of Workers' Compensation Law (R.C. Chapter 4121.), "employee" means every person who may be required or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, or to go, or work, or be at any time in any place of employment (R.C. 4121.01). The bill replaces this definition with the definition of "employee" described under "**Overview of the bill--definition of "employee"**" above. (R.C. 4121.01(A)(4) and conforming changes in R.C. 1349.61(E)(3).)

For the purposes of the Workers' Compensation Law (R.C. Chapter 4123.), the bill modifies, rather than replaces, the current law definition of "employee." The bill defines "employee" as described under "**Overview of the bill--definition of "employee"**" above, except that the bill retains the current law provision that includes in the definition of "employee" the following persons when responding to an inherently dangerous situation that calls for an immediate response on the part of the person, regardless of whether the person is within the limits of the jurisdiction of the person's regular employment or voluntary service when responding, on the condition that the person responds to the situation as the person otherwise would if the person were on duty in the person's jurisdiction:

- Off-duty peace officers.
- Off-duty firefighters, whether paid or volunteer, of a lawfully constituted fire department.
- Off-duty first responders, emergency medical technicians-basic, emergency medical technicians-intermediate, or emergency medical technicians-paramedic, whether paid or volunteer, of an ambulance service organization or emergency medical service organization pursuant to continuing law. (R.C. 4123.01(A).)

The bill also retains three of the four exceptions to the definition of "employee," but removes the exemption for an individual incorporated as a corporation. However, based upon the definition of "employee" under the bill, it does not appear removing the

exemption necessarily makes such an individual an "employee" for workers' compensation purposes. The bill also removes the ability of such an individual, however, to elect to obtain coverage under the Workers' Compensation Law. (R.C. 4123.01(A)(2).)

The bill removes from the definition of "employee" the specific inclusion of the following persons:

- Any person in the service of the state, or of any county, municipal corporation, township, or school district therein, including regular members of lawfully constituted police and fire departments of municipal corporations and townships, whether paid or volunteer, and wherever serving within Ohio or on temporary assignment outside thereof, and executive officers of boards of education, under any appointment or contract of hire, express or implied, oral or written, including any Ohio elected official, or any elected official of any county, municipal corporation, or township, or members of boards of education.
- Every person in the service of any person, firm, or private corporation, including any public service corporation, that (1) employs one or more persons regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, household workers who earn \$160 or more in cash in any calendar quarter from a single household and casual workers who earn \$160 or more in cash in any calendar quarter from a single employer, or (2) is bound by any such contract of hire or by any other written contract, to pay into the State Insurance Fund the premiums provided by the Workers' Compensation Law.
- Every person to whom all of the following apply: (1) the person is a resident of a state other than Ohio and is covered by that other state's workers' compensation law, (2) the person performs labor or provides services for that person's employer while temporarily within Ohio, and (3) the laws of that other state do not include certain provisions described in continuing law.

The bill also removes from the definition of "employee" the inclusion of every person who performs labor or provides services pursuant to a construction contract, as defined in continuing law, if at least ten of the following criteria apply:

- (1) The person is required to comply with instructions from the other contracting party regarding the manner or method of performing services;

(2) The person is required by the other contracting party to have particular training;

(3) The person's services are integrated into the regular functioning of the other contracting party;

(4) The person is required to perform the work personally;

(5) The person is hired, supervised, or paid by the other contracting party;

(6) A continuing relationship exists between the person and the other contracting party that contemplates continuing or recurring work even if the work is not full time;

(7) The person's hours of work are established by the other contracting party;

(8) The person is required to devote full time to the business of the other contracting party;

(9) The person is required to perform the work on the premises of the other contracting party;

(10) The person is required to follow the order of work set by the other contracting party;

(11) The person is required to make oral or written reports of progress to the other contracting party;

(12) The person is paid for services on a regular basis such as hourly, weekly, or monthly;

(13) The person's expenses are paid for by the other contracting party;

(14) The person's tools and materials are furnished by the other contracting party;

(15) The person is provided with the facilities used to perform services;

(16) The person does not realize a profit or suffer a loss as a result of the services provided;

(17) The person is not performing services for a number of employers at the same time;

(18) The person does not make the same services available to the general public;



(19) The other contracting party has a right to discharge the person;

(20) The person has the right to end the relationship with the other contracting party without incurring liability pursuant to an employment contract or agreement.

Currently, the Workers' Compensation Law states that every person in the service of any independent contractor or subcontractor who has failed to pay into the State Insurance Fund the amount of premium determined and fixed by the Administrator of Workers' Compensation for the person's employment or occupation or if a self-insuring employer has failed to pay compensation and benefits directly to the employer's injured and to the dependents of the employer's killed employees as required by the Workers' Compensation Law must be considered as the employee of the person who has entered into a contract, whether written or verbal, with such independent contractor unless such employees or their legal representatives or beneficiaries elect, after injury or death, to regard such independent contractor as the employer. The bill removes this provision; however, as discussed under "**Contractors and subcontractors**" below, under the bill, a contractor or subcontractor is liable for the failure of a subcontractor or lower tier subcontractor to properly classify an employee. (R.C. 4123.01(A).)

The bill also makes a number of conforming changes related to these revisions (R.C. 4123.026).

Other labor laws

"Employee" is not currently statutorily defined for purposes of the Bimonthly Pay Law, the Prevailing Wage Law, Unemployment Compensation Law, or the Income Tax Law. The bill adds the definition of employee described under "**Overview of the bill--definition of "employee"**" to all of these laws (R.C. 4113.15, 4115.03, 4141.01(EE), and 5747.01(GG)).

The Unemployment Compensation Law, however, does define "employment" for purposes of that law. Continuing law generally defines "employment" as service performed by an individual for remuneration under any contract of hire, written or oral, express or implied, including service performed in interstate commerce and service performed by an officer of a corporation, without regard to whether such service is executive, managerial, or manual in nature, and without regard to whether such officer is a stockholder or a member of the board of directors of the corporation, unless it is shown to the satisfaction of the Director of Job and Family Services that such individual has been and will continue to be free from direction or control, as defined by the Director, over the performance of such service, both under a contract of service and in fact (R.C. 4141.01(B)(1).) The Unemployment Compensation Law lists specific

services that are included in the definition of "employment." The bill expands the definition of "employment" as it relates to delivery drivers, to include in the definition a "delivery driver," rather than a agent driver or commission driver as under current law, engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (including milk, which is excluded under current law), laundry, parcels (added by the bill), freight (added by the bill), dry-cleaning services, or similar products (added by the bill). The bill removes the requirement that the distribution be for the individual's employer or principal. (R.C. 4141.01(B)(2)(e)(i).)

The bill also modifies the definition of "employment" as it relates to service performed as a traveling or city salesperson, removing the requirement that the services specified in continuing law be deemed employment if the contract of service contemplates that substantially all of the services are to be performed personally by the individual and that the individual does not have a substantial investment in facilities used in connection with the performance of the services other than in facilities for transportation, and the services are not in the nature of a single transaction that is not a part of a continuing relationship with the person for whom the services are performed (R.C. 4141.01(B)(2)(e)(ii)).

The bill removes the current law test to determine whether construction services provided by an individual are considered employment. Under current law, construction services performed by an individual under a construction contract as defined in continuing law constitutes employment if the Director determines that the employer for whom services are performed has the right to direct or control the performance of the services and that the individuals who perform the services receive remuneration for the services performed by examining whether ten or more of 20 specified criteria, which are similar to the criteria relating to construction listed under "**Workers' Compensation Law**" above apply (R.C. 4141.01(B)(2)(k).)

The Unemployment Compensation Law also excludes specified services from the definition of employment. The bill removes the exemption for services performed for one or more principals by an individual who is compensated on a commission basis, who in the performance of the work is master of the individual's own time and efforts, and whose remuneration is wholly dependent on the amount of effort the individual chooses to expend, and which service is not subject to the "Federal Unemployment Tax Act," 53 Stat. 183 (1939), 26 U.S.C.A. 3301 to 3311 (R.C. 4141.01(B)(3)(g)).

Prohibitions regarding misclassifying employees

The bill prohibits an employer from failing to designate an individual who performs services for the employer as an employee unless the conditions described in (1) to (7) under "**Overview of the bill--definition of "employee"**" above apply to that

individual (R.C. 4175.02(A)). The bill also prohibits any employer from retaliating through discharge, or in any other manner, against any individual for exercising any rights granted under the bill. Additionally, an employer cannot retaliate against an individual if the individual does any of the following:

- Makes a complaint to an employer, coworker, community organization, or to a federal or state agency or at a public hearing, stating that the bill's provisions allegedly have been violated;
- Causes to be instituted any proceeding under or related to the bill;
- Testifies or prepares to testify in an investigation or proceeding under the bill;
- Opposes misclassification. (R.C. 4175.02(B) and (C).)

Additionally, under the bill, no employer must attempt to cause or cause an individual to waive the provisions of the bill or to enter into a predispute waiver. The bill prohibits any person from requiring or requesting an individual to enter into an agreement or sign a document that results in the misclassification of the individual as an independent contractor or otherwise does not accurately reflect the individual's relationship with an employer. (R.C. 4175.02(D) and (F).)

The bill also prohibits any employer from violating a rule adopted by the Director pursuant to the bill (R.C. 4175.02(E)).

Except with respect to a violation against the prohibition regarding waivers, an employer or person that knowingly violates any of the prohibitions described immediately above, for the first offense, is guilty of a fourth degree misdemeanor, and for any subsequent violation of those prohibitions committed within a five-year period beginning on the date the employer or entity previously was convicted of or pleaded guilty to the first violation, the employer or entity is guilty of a fifth degree felony (R.C. 4175.99(A)). Whoever violates the prohibition against attempting to cause or causing an individual to waive the provisions of the bill or to enter into a predispute waiver is guilty of a fourth degree misdemeanor (R.C. 4175.99(B)). An employer that violates any of the prohibitions described above also may be subject to sanctions from the Director of Commerce as well as a civil suit by an aggrieved party as described in the bill (see "**Disciplinary actions**" and "**Aggrieved party action**" below).

Contractors and subcontractors

The bill states that the provisions of the bill apply to all subcontractors or lower tier subcontractors. A contractor is liable under the bill for the failure of any

subcontractor or lower tier subcontractor to properly classify individuals performing services related to construction as employees. Similarly, a subcontractor is liable under the bill for the failure of any lower tier subcontractor to properly classify individuals performing services related to construction as employees. (R.C. 4175.05.)

A "contractor," under the bill, means any sole proprietorship, partnership, firm, corporation, limited liability company, association, or other entity permitted by law to do business within Ohio that engages in construction. "Contractor" does not include the federal government or the state or its officers, agencies, or political subdivisions. A "subcontractor" is any person who undertakes to perform construction services under a contract with any individual other than the owner, part owner, or lessee. (R.C. 4175.01(C) and (I).)

Enforcement and administration of the bill

The bill requires the Director of Commerce to enforce the bill, however, the Superintendent of Labor within the Department of Commerce may perform the duties delegated to the Superintendent by the Director under the bill (R.C. 121.083(B) and 4175.06). The Director must hire as many investigators and other personnel as the Director determines are necessary to administer and enforce the bill. The bill permits the Director to adopt reasonable rules in accordance with Ohio's Administrative Procedure Act to implement and administer the bill. (R.C. 4175.06.)

Complaints, investigations, and hearings

Under the bill, any aggrieved party may file a complaint with the Director against an employer if the aggrieved party reasonably believes that the employer is in violation of the prohibitions listed in the bill (R.C. 4175.07). An "aggrieved party" means any of the following entities that believes that the entity has been injured by an employer's alleged violation of the bill's prohibitions:

- (1) An employee;
- (2) An employer association;
- (3) An interested party;
- (4) A labor organization (R.C. 4175.01(A)).

The bill requires the Director to conduct investigations in connection with the administration and enforcement of the bill. Any investigator employed by the Division of Labor within the Department of Commerce is authorized to visit and inspect, at all reasonable times, all of the offices and job sites maintained by the employer who is the

subject of the complaint, and is authorized to inspect and audit, at all reasonable times, all documents necessary to determine whether an individual performing services for the employer is an employee. The Director 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. Upon completion of an investigation, the investigator must submit the results of the investigator's investigation to the Superintendent. (R.C. 4175.07.)

If, after receiving the results of an investigation, the Superintendent determines that reasonable evidence exists that an employer has violated the bill's prohibitions, the Superintendent must send a written notice to the Director informing the Director of the inspector's determination. Within seven days after the Director receives the written report, the Director must send a written notice to the employer who is the subject of the investigation in the same manner as prescribed in the Administrative Procedure Act for licensees, except that the notice must specify that a hearing will be held and must specify the date, time, and place of the hearing. (R.C. 4175.08, by reference to R.C. 119.07, not in the bill.) The Director must hold a hearing regarding the alleged violation in the same manner prescribed for an adjudication hearing under the Administrative Procedure Act (R.C. 4175.08, by reference to R.C. 119.09, not in the bill). If an employer who allegedly committed a violation of the bill's prohibitions fails to appear for a hearing, the Director may request the court of common pleas of the county where the alleged violation occurred to compel the person to appear before the Director for a hearing (R.C. 4175.08).

In determining whether an employer misclassified an employee in violation of the bill, the Director must not use an employer's failure to withhold federal or state income taxes with respect to an individual or to include remuneration paid to an individual for purposes of the Workers' Compensation Law or Unemployment Compensation Law when making a determination as to whether the employer violated this prohibition. The bill prohibits the Director from using an individual's election to obtain workers' compensation coverage as a sole proprietor or a partnership in making a determination as to whether the individual has violated this prohibition. The burden of proof is on the party asserting that an individual is not an employee. (R.C. 4175.02(A).)

If the Director, after the hearing, determines a violation has occurred, the Director may discipline the employer in accordance with the bill (see "**Disciplinary actions**" below). The Director's determination is an order that the person may appeal the determination to the Franklin County Court of Common Pleas in accordance with the Administrative Procedure Act (R.C. 4175.08 by reference to R.C. 119.12, not in the bill).

Applicability of the determination made by the Director of Commerce

The bill applies only to determinations as to whether an individual is an employer for purposes of the MFWS, the Bimonthly Pay Law, the Prevailing Wage Law, the Workers' Compensation Law, the Unemployment Compensation Law, and the Income Tax Law. The bill states that nothing in the bill must be construed as to limit the application of any other remedies available at law or in equity. (R.C. 4175.03.)

The bill requires the Director of Commerce, the Director of Job and Family Services, the Tax Commissioner, and the Administrator of Workers' Compensation to share information concerning any suspected misclassification by an employer or entity of one or more of the employer's employees as independent contractors in violation of the prohibition against employee misclassification under the bill. Upon determining that an employer has misclassified an employee as an independent contractor in violation of that prohibition, the Director of Commerce must notify the Director of Job and Family Services, the Tax Commissioner, and the Administrator, each of whom must determine whether the employer's violation results in the employer not complying with the requirements of the MFWS, the Bimonthly Pay Law, the Prevailing Wage Law, the Workers' Compensation Law, the Unemployment Compensation Law, and the Income Tax Law, as applicable. The determination made by the Director of Commerce that an employer has misclassified an employee as an independent contractor is binding on the Director of Job and Family Services, the Tax Commissioner, and the Administrator unless the individual is otherwise not considered an employee under the applicable law. Notwithstanding anything in this provision to the contrary, nothing in the bill is permitted to be construed to limit or otherwise constrain the duties and powers of the Administrator under the Workers' Compensation Law, the Director of JFS under the Unemployment Compensation Law, or the Tax Commissioner under the Income Tax Law. (R.C. 4175.17.)

Disciplinary actions

If, after a hearing held in accordance with the bill, the Director of Commerce determines that an employer violated the prohibitions listed under "**Prohibitions regarding misclassifying employees**" above, the Director may do any of the following:

- (1) Issue and cause to be served on any party an order to cease and desist from further violation of the prohibitions;
- (2) Take affirmative or other action the Director considers reasonable to eliminate the effect of the violation;

(3) Collect the amount of any wages, salary, employment benefits, or other compensation denied or lost to an individual because the employer misclassified the individual;

(4) Assess any civil penalty allowed under "**Civil penalties**" below (R.C. 4175.09(A)).

Additionally, the bill requires the Attorney General to bring any action for relief requested by the Director in the name of the people of the state of Ohio (R.C. 4175.09(C)).

Civil penalties

Except as otherwise provided in the following paragraph and under "**Knowing violations**" below, if, after a hearing, the Director determines that an employer has violated the bill's prohibitions, the employer is subject to a civil penalty of \$1,500 for each violation. Except as otherwise provided under "**Knowing violations**" below, if, after a hearing, the Director determines that the employer has committed a violation of the bill's prohibitions and that violation occurred within five years after the date the Director made a determination that resulted in the Director assessing the employer a civil penalty under the bill, the employer is subject to a civil penalty not to exceed \$2,500 for each violation found by the Director that occurred during that five-year period. (R.C. 4175.10(A) and (B).)

For purposes of this provision, each violation of the prohibitions constitutes a separate violation for each individual or rule involved and for each day the violation continues. The bill requires the Director to base the amount of the civil penalty assessed under the bill upon the Director's determination of the gravity of the violations committed by the employer. (R.C. 4175.10(C) and (D).)

If the Director assesses an employer a civil penalty and the employer fails to pay that civil penalty within the time period prescribed by the Director, the Director must forward to the Attorney General the name of the employer and the amount of the civil penalty for the purpose of collecting that civil penalty. In addition to the civil penalty assessed, the employer also must pay any fee assessed by the Attorney General for collection of the civil penalty. (R.C. 4175.09(B).)

Knowing violations

Whoever knowingly violates the bill's prohibitions, or whoever obstructs the Director or any other person authorized to inspect places of employment pursuant to "**Complaints, investigations, and hearings**" above, is liable for penalties up to double the amount specified under "**Civil penalties**" above. An employer who is liable under

this provision because the employer knowingly violated the bill's prohibitions also is liable to the employee who was injured by the employer's violation for punitive damages in an amount equal to the amount of the penalties assessed against the employer pursuant to this provision. The bill requires the Director to impose these penalties if a preponderance of the evidence demonstrates that the employer acted knowingly when committing the violation. (R.C. 4175.11.)

Debarment list

Under the bill, the Director must create a list of employers who have committed multiple violations of the prohibition listed under "**Prohibitions regarding misclassifying employees**" above. The Director must add an employer's name to the list if the Director assess the higher (repeat violator) civil penalty described under "**Civil penalties**" above. The list must include the name of the employer and the date that the employer committed the employer's most recent violation. The Director must notify an employer that the employer will be added to this list within five days after the Director determines that the employer will be added to the list. The Director must publish the list on the web site maintained by the Department of Commerce. The bill prohibits any state agency from entering into a contract with an employer included in that list for a period of four years after the date of the employer's most recent violation. The Director must remove an employer's name and information from the list upon expiration of the time period of the employer's debarment. (R.C. 4175.16.)

Referral for prosecution

Under the bill, if the Director determines that an alleged violation of the bill has occurred that may result in a criminal penalty being assessed, the Director must refer the matter to the appropriate prosecutorial authority (R.C. 4175.12).

Enforcement of Director's order

Under the bill, if the Director believes that any employer allegedly has violated a valid order issued by the Director under "**Disciplinary actions**" above, the Director may commence an action in the court of common pleas in the county where the alleged violation has occurred and obtain from the court an order compelling the employer to obey the order of the Director or be found guilty of contempt of court and punished in accordance with the Contempt of Court Law (R.C. Chapter 2705.) (R.C. 4175.13).

Aggrieved party action

The bill permits an aggrieved party to file suit in the court of common pleas in the county where the alleged violation occurred or where any individual who is party to the action resides, without regard to exhaustion of any alternative administrative

remedies provided in the bill (R.C. 4175.14(A)). An aggrieved party may bring an action on behalf of the aggrieved party or on behalf of any other individual who is similarly situated to the aggrieved party. If a court or a jury in a civil action brought pursuant to this provision determines that a violation of the bill's prohibitions has occurred, the court must award to the plaintiff all of the following:

(1) The amount of any wages, salary, employment benefits, or other compensation denied or lost to an individual 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 the bill's prohibitions;

(3) In the case of a violation of prohibitions against retaliating against an individual for taking specified actions, all legal or equitable relief that the court determines appropriate;

(4) Attorney's fees and costs (R.C. 4175.14(A)).

The bill requires an aggrieved party to bring the action described above not later than three years after the last day the aggrieved individual or individual for whom the aggrieved party is bringing the action performed services for an employer who has allegedly violated the bill's prohibitions. The bill tolls this three-year period if the employer has deterred the ability of an individual to bring an action under this provision or to file a complaint with the Director as described under "**Complaints, investigations, and hearings**" above. (R.C. 4175.14(B).)

Under the bill, if the Director has determined after a hearing held pursuant to the bill that an employer is subject to a civil penalty, an aggrieved party, within 90 days after the Director issues that determination, may bring a civil action in the court of common pleas in the county where the violation occurred to enforce that penalty. If an aggrieved party elects to bring such an action, the aggrieved party must notify the Director of that election in writing. During that 90-day period, the bill prohibits the Attorney General from bringing an action to enforce that penalty. After the 90-day period expires, only the Attorney General, on behalf of the Director and in accordance with the bill, may bring an action to collect the civil penalty. In any civil action brought by an aggrieved party to enforce the penalty, the court must award the aggrieved party 10% of the amount of the penalty owed by the employer, and the remaining amount recovered must be awarded to the Director. (R.C. 4175.14(C).)

Posting of bill's requirements

The bill requires the Director to create a summary of the requirements of the bill in English and Spanish and to post that summary on the official web site maintained by the Department of Commerce and on the bulletin boards located in each of the offices of the Department. If an employer engages an individual to perform services and that individual is not considered an employee, that employer must post and keep posted, in a conspicuous place on each job site where that individual performs services and in each of the employer's offices, the notice prepared by the Director. The Director must furnish copies of the notice without charge to an employer upon request. (R.C. 4175.15.)

Employee Classification Fund

The bill creates in the state treasury the Employee Classification Fund. The Director must deposit all moneys the Director receives under the bill, including civil penalties, into the Fund. The bill requires the Director to use the Fund for the administration, investigation, and other expenses incurred in carrying out the Director's powers and duties under the bill. If, at the end of a fiscal year, the Director determines that excess moneys exist in the Fund, the Director must coordinate with the Director of Budget and Management to transfer the excess funds to the Division of Administration Fund within the Department. (R.C. 4175.18.)

Definitions

The bill defines the following terms:

Construction

"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, regardless of whether the performance of the work involves the addition to or fabrication of any material or article of merchandise into any structure, project, development, real property, or improvement. "Construction" includes moving construction-related materials to the job site and removing construction-related materials from the job site. (R.C. 4175.01(B).)

Interested party

"Interested party" means any of the following entities:



- Any contractor who submits a bid for the purpose of securing the award of a contract for construction of a public improvement as that term is defined under the Prevailing Wage Law;
- Any person acting as a subcontractor of a contractor described above;
- Any bona fide labor organization that has as members or is authorized to represent employees of a contractor or subcontractor described above;
- Any association having as members any of the contractors or subcontractors described above (R.C. 4175.01(F)).

Labor organization

"Labor organization" means a labor union; an employee organization; a federation of labor unions, groups, locals, or other employee organizations; an auxiliary of a labor union, employee organization, or federation of labor unions, groups, locals, or other employee organizations; or any other bona fide organization in which employees participate and that exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, hours, and other terms and conditions of employment (R.C. 4175.01(G), by reference to R.C. 3517.01, not in the bill).

State agency

"State agency" means every organized body, office, or agency established by the laws of Ohio for the exercise of any function of state government (R.C. 4175.01(H), by reference to R.C. 1.60, not in the bill).

COMMENT

The FLSA defines "employee" as any individual employed by an employer. In the case of an individual employed by a public agency, "employee" means either of the following:

- An individual employed by the United States government (1) as a civilian in the military departments, (2) in any executive agency, (3) in any unit of the judicial branch of the government that has positions in the competitive service, (4) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, (5) in the Library of Congress, or (6) in the Government Printing Office;
- Any individual employed by the United States Postal Service or the Postal Regulatory Commission.

"Employee," under the FLSA, also includes any individual employed by a state, political subdivision of a state, or an interstate governmental agency, other than an individual who is not subject to the civil service laws of the state, political subdivision, or agency that employs individual and who does one of the following:

- Holds a public elective office of that state, political subdivision, or agency;
- Is selected by the holder of such an office to be a member of the officeholder's personal staff;
- Is appointed by such an officeholder to serve on a policymaking level;
- Is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of the officeholder's office; or
- Is an employee in the legislative branch or legislative body of that state, political subdivision, or agency and is not employed by the legislative library of that state, political subdivision, or agency. (29 U.S.C. 203(e)(1) and (2).)

For purposes of agricultural employment, "employee" does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family. Additionally, "employee" under the FLSA does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries. (29 U.S.C. 203(e)(3) and (5).)

Under the FLSA, "employee" does not include any individual who volunteers to perform services for a public agency that is a state, a political subdivision of a state, or an interstate governmental agency, if the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and the services are not the same type of services which the individual is employed to perform for such public agency. An employee of such a public agency or an interstate governmental agency may volunteer to perform services for any other state, political subdivision, or interstate governmental agency, including a state, political subdivision or agency with which the employing state, political subdivision, or agency has a mutual aid agreement. (29 U.S.C. 203(e)(4).)

The FLSA exempts many types of individuals from the minimum wage requirements of the FLSA, such as (1) any employee employed in a bona fide executive, administrative, or professional capacity, (2) various employees engaged in agriculture, (3) any employee employed on a casual basis in domestic service employment to provide (a) babysitting services or (b) companionship services to those unable to care

for themselves, (4) certain criminal investigators, and (5) certain computer system analysts, computer programmers, software engineers, and other similarly skilled employees. Other individuals exempt from the minimum wage requirements of the FLSA include (1) employees employed in amusement parks, recreational establishments, organized camps, or religious or non-profit educational conference centers, when these entities satisfy specified criteria, (2) certain apprentices and students, (3) employees employed in connection with certain types of newspapers of less than 4,000 circulation, (4) switchboard operators of certain public telephone companies, (5) seaman on a vessel other than an American vessel, (6) outside salespersons, and (7) employees engaged in fishing operations. (See 29 U.S.C. 213.)

HISTORY

ACTION	DATE
Introduced	05-24-10
Reported, H. Commerce & Labor	12-08-10
Failed, Third Consideration, House (49-47)	12-08-10

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