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SENATE DRS45330-LR-106A (03/14)

Short Title: Employee Misclassification Reform. (Public)

Sponsors: Senators Newton, Lee, and Daniel (Primary Sponsors).

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO ENACT THE EMPLOYEE FAIR CLASSIFICATION ACT.
3 The General Assembly of North Carolina enacts:

4
5 **PART I. EMPLOYEE FAIR CLASSIFICATION ACT**

6 **SECTION 1.1.** Chapter 143 of the General Statutes is amended by adding a new
7 Article to read:

8 "Article 81.

9 "Employee Fair Classification Act.

10 **"§ 143-760. Title.**

11 This Article shall be known and may be cited as the "Employee Fair Classification Act."

12 **"§ 143-761. Definitions; scope.**

13 (a) The following definitions apply in this Article:

14 (1) Employ. – To suffer or permit to work.

15 (2) Employer. – Any entity that employs one or more employees as defined by
16 G.S. 95-272(3).

17 (3) Employee. – Any individual that is defined as an employee by either
18 G.S. 143-25.2(4), G.S. 143-47.1(6), G.S. 143-174, G.S. 96-1(10),
19 G.S. 97-2(2) or G.S. 105-163.1(4). The term does not mean an individual
20 who is an independent contractor under G.S. 143-273.

21 (4) Employee misclassification. – Avoiding tax liabilities and other obligations
22 imposed by Chapter 95, Chapter 96, Chapter 97, or Chapter 105 of the
23 General Statutes by misclassifying an employee as an independent
24 contractor.

25 (5) Employee Misclassification Division or Division. – The Employee
26 Misclassification Division within the OSBM.

27 (6) OSBM. – Office of State Budget and Management.

28 (b) Nothing in this Article shall be construed, or is intended, to change the definition of
29 "employer" or "employee" under any other provision of law.

30 (c) The provisions G.S. 143-280 are intended to codify the holding in Hayes v. Board
31 of Trustees of Elon College, 244 N.C. 11(1944).

32 **"§ 143-762 Employee Misclassification Division.**

33 (a) The Employee Misclassification Division is established within the Office of State
34 Budget and Management.

35 (b) The State Budget Director shall appoint a director of the Division to serve at the
36 Budget Director's pleasure with such authority as the Director deems necessary to direct and



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1 oversee the Division in carrying out the purposes of this Article. The director shall be exempt
2 from the State Human Resources Act and shall devote his or her entire time to the duties of the
3 Division. The director may delegate any duties and responsibilities as may be necessary to
4 ensure the proper management of the Division. The director's salary shall be set by the State
5 Budget Director.

6 (c) The State Budget Director may employ clerical staff, investigators, and other staff
7 within the Division as is necessary for the Division to perform its duties under this Article.
8 Notwithstanding Chapters 126, 143A, and 143B of the General Statutes or any other provision
9 of law, the director may hire or fire personnel and transfer personnel within the Division. The
10 Division shall be provided with adequate offices in which the Division's records shall be kept
11 and its official business transacted during regular business hours. The Division shall also be
12 provided with necessary office furniture, stationery, and other supplies.

13 (e) The Office of the State Chief Information Officer shall ensure that the Division is
14 provided with all necessary access to the Government Data Analytics Center and all other
15 information technology services.

16 **"§ 143-763. Division powers and duties.**

17 (a) The Division shall have the following duties:

- 18 (1) Be available during business hours to receive reports of employee
19 misclassification by telephonic, written, or electronic communication.
- 20 (2) Investigate reports of employee misclassification, coordinate with, and assist
21 all relevant State agencies in recovering any back taxes, wages, benefits,
22 penalties, or other monies owed as a result of an employer engaging in
23 employee misclassification.
- 24 (3) Assess administrative civil penalties for instances of employee
25 misclassification as set forth in G.S. 143-765.
- 26 (4) Refer contested penalty assessments to the Office of Administrative
27 Hearings for an in-person hearing.
- 28 (5) Where provided by law, coordinate with relevant State agencies and District
29 Attorneys' offices in the prosecution of employers and individuals who fail
30 to pay civil assessments or penalties assessed as a result of the employer or
31 individual's involvement in employee misclassification.
- 32 (6) Provide all relevant information pertaining to each instance of reported
33 employee misclassification to the North Carolina Department of Labor, the
34 North Carolina Department of Revenue, the North Carolina Division of
35 Employment Security, and the North Carolina Industrial Commission to
36 facilitate investigation of potential violations of Chapter 143, Chapter 96,
37 Chapter 97, or Chapter 105 of the General Statutes.
- 38 (7) Create a publicly available notice that includes the definition of employee
39 misclassification and indicates the civil penalties provided for in
40 G.S. 143-765.
- 41 (8) Develop methods and strategies for information sharing between State
42 agencies in order to proactively identify possible instances of employee
43 misclassification.
- 44 (9) Develop methods and strategies to educate employers, employees, and the
45 public about proper classification of employees and the prevention of
46 employee misclassification.
- 47 (10) Establish training modules and materials pertaining to the investigation and
48 enforcement of incidents of employee misclassification for use by State
49 agency investigators and law enforcement agencies.

1 (b) The director shall appoint an informal advisory council to advise the director on
2 issues within the jurisdiction of the Division. The members of the advisory council shall
3 include, at a minimum:

4 (1) The following officers or the officer's designee:

5 a. Commissioner of Labor.

6 b. Secretary of Revenue.

7 c. Chairman of the Industrial Commission.

8 d. Assistant Secretary of Commerce for the Division of Employment
9 Security.

10 (2) A representative of workers in this State.

11 (3) A representative of employers in this State.

12 The members of the council shall not receive compensation, per diem, or expense
13 reimbursement, from the State Treasury for their service on the advisory council.

14 (c) No later than October 1 of each year, the Division shall publish annually to the
15 Office of the Governor and to the Joint Legislative Commission on Governmental Operations a
16 report of the administration of this Article, together with any recommendations as the Division
17 deems advisable. This report shall include, at a minimum, the number of reports of employee
18 misclassification received, the number and amount of back taxes, wages, benefits, penalties, or
19 other monies assessed, the amount of back taxes, wages, benefits, penalties, or other monies
20 collected, and the number of cases referred to each State agency.

21 **"§ 143-764. Determination of independent contractor status.**

22 (a) The following factors shall be considered in determining whether an individual is an
23 independent contractor for purposes of this Article:

24 (1) Whether the individual is engaged in an independent business or occupation
25 wherein specialized skill, knowledge, or training is utilized independently to
26 complete a specific piece of work.

27 (2) Whether the individual is in the regular employ of the contracting party and
28 is paid for completing a specific piece of work instead of being paid wages.

29 (3) Whether the individual selects his or her own hours to complete the work by
30 a deadline and is not subject to discharge if one method of performing the
31 work is adopted over another method.

32 (4) Whether the individual has the freedom to use and independently control his
33 or her own assistants.

34 (b) The presence of one or more of the foregoing factors is not controlling, nor is the
35 presence of all of the foregoing factors required in determining whether an individual is an
36 independent contractor.

37 **"§ 143-765. Employee misclassification prohibited; civil penalties; repeated instances of**
38 **misclassification.**

39 (a) Employee misclassification is prohibited.

40 (b) Any employer who is found by the Division to have engaged in employee
41 misclassification after being assessed any back taxes, wages, benefits, penalties, or other
42 monies by any State agency as a result of misclassifying one or more employees within the
43 previous three calendar years shall be assessed a civil penalty of no greater than one thousand
44 dollars (\$1,000) per misclassified employee for any future instances of employee
45 misclassification. In determining the amount of the penalty to be assessed, the Division shall
46 consider the degree of willfulness or negligence by the employer in engaging in the employee
47 misclassification. The penalty herein provided shall be assessed by the Division
48 administratively, with the right to a hearing conducted by the Office of Administrative
49 Hearings if requested in writing within 30 days after notice of the assessment of the penalty.
50 Enforcement of the penalty shall be made by the Office of the Attorney General. The clear

1 proceeds of penalties provided for in this subsection shall be remitted to the Civil Penalty and
2 Forfeiture Fund in accordance with G.S. 115C-457.2.

3 (c) Nothing in this section shall be construed to create a private right of action, at law or
4 in equity, for the activities prohibited by this Article.

5 **"§ 143-766. Temporary amnesty program.**

6 (a) The Division shall establish and administer a temporary amnesty program for the
7 purpose of encouraging voluntary self-reporting by employers currently engaging in employee
8 misclassification. Every employer participating in the temporary amnesty program shall be
9 immune from the civil penalties provided for in G.S. 143-765 for past instances of employee
10 misclassification that are voluntarily self-reported by the employer in accordance with the
11 procedures of the temporary amnesty program.

12 (b) The Division shall establish procedures for participation in the temporary amnesty
13 program. These procedures shall require, at a minimum, that a participating employer:

14 (1) File an application with the Division on a form prescribed by the Division on
15 or before April 1, 2016. This form shall require, at a minimum, the
16 employer's name, physical address, mailing address, telephone number,
17 Social Security number or taxpayer ID number, and disclosure of all actual
18 or potential instances of employee misclassification. If available, this form
19 shall require the employer's registered agent, driver's license number, license
20 number(s), and issuing agency of all licenses issued by a State licensing
21 board.

22 (2) Comply with any and all determinations made or directives issued by the
23 Division pertaining to the employer's application and compliance with this
24 Article.

25 (c) Nothing in this section shall be construed to limit the liability of a participating
26 employer in any civil or criminal matter not provided for by this Article.

27 **"§ 143-767. Occupational licensing boards and commissions; notice requirement;**
28 **applicant certification.**

29 (a) Every State occupational licensing board or commission that is authorized to issue
30 any license, permit, or certification shall include on every application for licensure, permit, or
31 certification, or application for renewal of the same, a certification that the applicant has read
32 and understands the employee misclassification notice set forth in G.S. 143-763(a)(7).

33 (b) Every applicant for a license, permit, or certification issued by a State occupational
34 licensing board or commission shall truthfully certify on the appropriate application that the
35 applicant has read and understands the employee misclassification notice set forth in
36 G.S. 143-763(a)(7).

37 (c) An occupational licensing board or commission shall deny the license, permit, or
38 certification application of any applicant who fails to comply with the certification requirement
39 set forth in subsection (b) of this section.

40 **"§ 143-768. Confidentiality; access to records.**

41 The records of the Division that are not civil penalty assessments or final orders relating to
42 an appeal of a civil penalty assessment, insofar as they refer to reported violations,
43 investigations, or other enforcement actions taken by the Division, are not public records under
44 G.S. 132-1, but are subject to inspection by State and federal agencies as required by the
45 provisions of this Article and Chapter 95, Chapter 96, Chapter 97, and Chapter 105 of the
46 General Statutes."

47 **SECTION 1.2.** G.S. 97-5.1 is repealed.

49 **PART II. MISCLASSIFICATION NOTICE ADDED TO NCDOL POSTERS**

50 **SECTION 2.1.** G.S. 95-25.15(c) reads as rewritten:

1 "(c) A poster summarizing the major provisions of this Article shall be displayed in
2 every establishment subject to this Article. This poster shall also include notice indicating the
3 following:

- 4 (1) Any worker who is defined as an employee by either G.S. 95-25.2(4),
5 G.S. 95-47.1(6), G.S. 143-174, G.S. 96-1(10), G.S. 97-2(2), or
6 G.S. 105-163.1(4) shall be treated as an employee unless the individual is an
7 independent contractor.
- 8 (2) Any employee who believes that they have been misclassified as an
9 independent contractor by their employer may report the suspected
10 misclassification to the Employee Misclassification Division.
- 11 (3) The physical location, mailing address, telephone number, and E-mail
12 address where alleged incidents of employee misclassification may be
13 reported to the Employee Misclassification Division."

15 PART III. SANCTIONS AND OTHER REQUIREMENTS CONCERNING EMPLOYEE 16 MISCLASSIFICATION

17 **SECTION 3.1.** G.S. 87-11 reads as rewritten:

18 **"§ 87-11. Revocation of license; charges of fraud, negligence, incompetency, etc.; hearing**
19 **thereon; reissuance of certificate.**

20 (a) The Board shall have the power to refuse to issue or renew or revoke, suspend, or
21 restrict a certificate of license or to issue a reprimand or take other disciplinary action if a
22 general contractor licensed under this Article is found guilty of any fraud or deceit in obtaining
23 a license, or gross negligence, incompetency, or misconduct in the practice of his or her
24 profession, or willful violation of any provision of this ~~Article.~~ Article, or has been found to
25 have engaged in employee misclassification in violation of Article 81 of Chapter 143 of the
26 General Statutes. The Board shall also have the power to revoke, suspend, or otherwise restrict
27 the ability of any person to act as a qualifying party for a license to practice general contracting,
28 as provided in G.S. 87-10(c), for any copartnership, corporation or any other organization or
29 combination, if that person committed any act in violation of the provisions of this section and
30 the Board may take disciplinary action against the individual license held by that person.

31 (a1) Any person may prefer charges of fraud, deceit, negligence, or misconduct against
32 any general contractor licensed under this Article. The charges shall be in writing and sworn to
33 by the complainant and submitted to the Board. The charges, unless dismissed without hearing
34 by the Board as unfounded or trivial, shall be heard and determined by the Board in accordance
35 with the provisions of Chapter 150B of the General Statutes.

36 (b) The Board shall adopt and publish guidelines, consistent with the provisions of this
37 Article, governing the suspension and revocation of licenses. These guidelines shall include
38 references to the prohibition of employee misclassification under Article 81 of Chapter 143 of
39 the General Statutes and state that engaging in employee misclassification is grounds for
40 revocation of a license issued under this Article.

41 (c) The Board shall establish and maintain a system whereby detailed records are kept
42 regarding complaints against each licensee. This record shall include, for each licensee, the date
43 and nature of each complaint, investigatory action taken by the Board, any findings by the
44 Board, and the disposition of the matter.

45 (d) The Board may reissue a license to any person, firm or corporation whose license
46 has been revoked: Provided, five or more members of the Board vote in favor of such
47 reissuance for reasons the Board may deem sufficient.

48 The Board shall immediately notify the Secretary of State of its findings in the case of the
49 revocation of a license or of the reissuance of a revoked license.

50 A certificate of license to replace any certificate lost, destroyed or mutilated may be issued
51 subject to the rules and regulations of the Board.

1 (e) The Board shall be entitled to recover its reasonable administrative costs associated
2 with the investigation and prosecution of a violation of this Article or rules or regulations of the
3 Board up to a maximum of five thousand dollars (\$5,000) for any licensee or qualifying party
4 found to have committed any of the following:

5 (1) Fraud or deceit in obtaining a license.

6 (2) Gross negligence, incompetency, or misconduct in the practice of general
7 contracting.

8 (3) Willful violation of any provision of this Article."

9 **SECTION 3.2.** G.S. 143-59.2(a) reads as rewritten:

10 "(a) Ineligible Vendors. – A vendor is not entitled to enter into a contract for goods or
11 services with any department, institution, or agency of the State government subject to the
12 provisions of this Article if any officer or director of the vendor, or any owner if the vendor has
13 been assessed a civil penalty under the Employee Fair Classification Act within five years prior
14 to the date of the bid solicitation, is an unincorporated business entity, within 10 years
15 immediately prior to the date of the bid solicitation, has been convicted of any violation of
16 Chapter 78A of the General Statutes or the Securities Act of 1933 or the Securities Exchange
17 Act of 1934."

18 **SECTION 3.3.** G.S. 153A-134 is amended by adding a new subsection to read:

19 "(d) An applicant subject to regulation and licensure by a county under this section shall
20 certify to the county that the applicant has read and understands the employee misclassification
21 notice required under G.S. 143-763(a)(7)."

22 **SECTION 3.4.** G.S. 160A-194 is amended by adding a new subsection to read:

23 "(d) An applicant subject to regulation and licensure by a city under this section shall
24 certify to the county that the applicant has read and understands the employee misclassification
25 notice required under G.S. 143-763(a)(7)."

26 **SECTION 3.5.** G.S. 153A-360 reads as rewritten:

27 **"§ 153A-360. Inspections of work in progress.**

28 (a) As the work pursuant to a permit progresses, local inspectors shall make as many
29 inspections of the work as may be necessary to satisfy them that it is being done according to
30 the provisions of the applicable State and local laws and local ordinances and regulations and
31 of the terms of the permit. In exercising this power, each member of the inspection department
32 has a right, upon presentation of proper credentials, to enter on any premises within the
33 territorial jurisdiction of the department at any reasonable hour for the purposes of inspection or
34 other enforcement action. If a permit has been obtained by an owner exempt from licensure
35 under G.S. 87-1(b)(2), no inspection shall be conducted without the owner being personally
36 present, unless the plans for the building were drawn and sealed by an architect licensed
37 pursuant to Chapter 83A of the General Statutes.

38 (b) Each owner shall certify to the county that the owner has read and understands the
39 employee misclassification notice required under G.S. 143-763(a)(7)."

40 **SECTION 3.6.** G.S. 160A-420 reads as rewritten:

41 **"§ 160A-420. Inspections of work in progress.**

42 (a) As the work pursuant to a permit progresses, local inspectors shall make as many
43 inspections thereof as may be necessary to satisfy them that the work is being done according
44 to the provisions of any applicable State and local laws and of the terms of the permit. In
45 exercising this power, members of the inspection department shall have a right to enter on any
46 premises within the jurisdiction of the department at all reasonable hours for the purposes of
47 inspection or other enforcement action, upon presentation of proper credentials. If a permit has
48 been obtained by an owner exempt from licensure under G.S. 87-1(b)(2), no inspection shall be
49 conducted without the owner being personally present, unless the plans for the building were
50 drawn and sealed by an architect licensed pursuant to Chapter 83A of the General Statutes.

1 (b) Each owner shall certify to the city that the owner has read and understands the
2 employee misclassification notice required under G.S. 143-763(a)(7)."

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4 **PART IV. CONFORMING CHANGE TO WORKERS' COMPENSATION ACT**

5 **SECTION 4.1.** G.S. 97-2(2) reads as rewritten:

6 **"§ 97-2. Definitions.**

7 When used in this Article, unless the context otherwise requires:

8 ...
9 (2) Employee. – The term "employee" means every person engaged in an
10 employment under any appointment or contract of hire or apprenticeship,
11 express or implied, oral or written, including aliens, and also minors,
12 whether lawfully or unlawfully employed, but excluding persons whose
13 employment is both casual and not in the course of the trade, business,
14 profession, or occupation of his employer, and as relating to those so
15 employed by the State, the term "employee" shall include all officers and
16 employees of the State, including such as are elected by the people, or by the
17 General Assembly, or appointed by the Governor to serve on a per diem,
18 part-time or fee basis, either with or without the confirmation of the Senate;
19 as relating to municipal corporations and political subdivisions of the State,
20 the term "employee" shall include all officers and employees thereof,
21 including such as are elected by the people. The term "employee" shall
22 include members of the North Carolina National Guard while on State active
23 duty under orders of the Governor and members of the North Carolina State
24 Defense Militia while on State active duty under orders of the Governor. The
25 term "employee" shall include deputy sheriffs and all persons acting in the
26 capacity of deputy sheriffs, whether appointed by the sheriff or by the
27 governing body of the county and whether serving on a fee basis or on a
28 salary basis, or whether deputy sheriffs serving upon a full-time basis or a
29 part-time basis, and including deputy sheriffs appointed to serve in an
30 emergency, but as to those so appointed, only during the continuation of the
31 emergency. The sheriff shall furnish to the board of county commissioners a
32 complete list of all deputy sheriffs named or appointed by him immediately
33 after their appointment and notify the board of commissioners of any
34 changes made therein promptly after such changes are made. Any reference
35 to an employee who has been injured shall, when the employee is dead,
36 include also the employee's legal representative, dependents, and other
37 persons to whom compensation may be payable: Provided, further, that any
38 employee, as herein defined, of a municipality, county, or of the State of
39 North Carolina, while engaged in the discharge of the employee's official
40 duty outside the jurisdictional or territorial limits of the municipality, county,
41 or the State of North Carolina and while acting pursuant to authorization or
42 instruction from any superior officer, shall have the same rights under this
43 Article as if such duty or activity were performed within the territorial
44 boundary limits of their employer.

45 Every executive officer elected or appointed and empowered in
46 accordance with the charter and bylaws of a corporation shall be considered
47 as an employee of such corporation under this Article.

48 Any such executive officer of a corporation may, notwithstanding any
49 other provision of this Article, be exempt from the coverage of the
50 corporation's insurance contract by such corporation's specifically excluding
51 such executive officer in such contract of insurance, and the exclusion to

1 remove such executive officer from the coverage shall continue for the
2 period such contract of insurance is in effect, and during such period such
3 executive officers thus exempted from the coverage of the insurance contract
4 shall not be employees of such corporation under this Article.

5 All county agricultural extension service employees who do not receive
6 official federal appointments as employees of the United States Department
7 of Agriculture and who are field faculty members with professional rank as
8 designated in the memorandum of understanding between the North
9 Carolina Agricultural Extension Service, North Carolina State University, A
10 & T State University, and the boards of county commissioners shall be
11 deemed to be employees of the State of North Carolina. All other county
12 agricultural extension service employees paid from State or county funds
13 shall be deemed to be employees of the county board of commissioners in
14 the county in which the employee is employed for purposes of workers'
15 compensation.

16 The term "employee" shall also include members of the Civil Air Patrol
17 currently certified pursuant to G.S. 143B-1031(a) when performing duties in
18 the course and scope of a State-approved mission pursuant to Subpart C of
19 Part 5 of Article 13 of Chapter 143B of the General Statutes.

20 "Employee" shall not include any person performing voluntary service as
21 a ski patrolman who receives no compensation for such services other than
22 meals or lodging or the use of ski tow or ski lift facilities or any combination
23 thereof.

24 Any sole proprietor or partner of a business or any member of a limited
25 liability company may elect to be included as an employee under the
26 workers' compensation coverage of such business if he is actively engaged in
27 the operation of the business and if the insurer is notified of his election to
28 be so included. Any such sole proprietor or partner or member of a limited
29 liability company shall, upon such election, be entitled to employee benefits
30 and be subject to employee responsibilities prescribed in this Article.

31 "Employee" shall include an authorized pickup firefighter of the North
32 Carolina Forest Service of the Department of Agriculture and Consumer
33 Services when that individual is engaged in emergency fire suppression
34 activities for the North Carolina Forest Service. As used in this section,
35 "authorized pickup firefighter" means an individual who has completed
36 required fire suppression training as a wildland firefighter and who is
37 available as needed by the North Carolina Forest Service for emergency fire
38 suppression activities, including immediate dispatch to wildfires and standby
39 for initial attack on fires during periods of high fire danger.

40 ~~It shall be a rebuttable presumption that the term "employee" shall not~~
41 ~~include any person performing services in the sale of newspapers or~~
42 ~~magazines to ultimate consumers under an arrangement whereby the~~
43 ~~newspapers or magazines are to be sold by that person at a fixed price and~~
44 ~~the person's compensation is based on the retention of the excess of the fixed~~
45 ~~price over the amount at which the newspapers or magazines are charged to~~
46 ~~the person."~~

47 **PART V. SEVERABILITY**

48 **SECTION 5.1.** If any section or provision of this act is declared unconstitutional or
49 invalid by the courts, it does not affect the validity of this act as a whole or any part other than
50 the part so declared to be unconstitutional or invalid.
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PART VI. EFFECTIVE DATE

SECTION 6.1. This act becomes effective July 1, 2015.