

SB 1937

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THE STATE SENATE  
Monday, February 22, 2010

Senate Bill No. 1937  
As Amended

SENATE BILL NO. 1937 - By: Coates of the Senate and Proctor of the House.

[ labor - creating the Oklahoma Employee Classification Act  
- codification - effective date ]

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 701 of Title 40, unless there is created a duplication in numbering, reads as follows:

This act shall be known and may be cited as the "Oklahoma Employee Classification Act". This act is intended to address the practice of misclassifying employees as independent contractors.

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 702 of Title 40, unless there is created a duplication in numbering, reads as follows:

As used in the Oklahoma Employee Classification Act:

- 1. "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

1 any building, structure, highway, roadway, street, bridge, alley,  
2 sewer, ditch, sewage disposal plant, waterworks, parking facility,  
3 railroad, excavation or other structure, project, development, real  
4 property or improvement, or to do any part thereof, whether or not  
5 the performance of the work herein described involves the addition  
6 to, or fabrication into, any structure, project, development, real  
7 property or improvement herein described of any material or article  
8 of merchandise. Construction shall also include moving  
9 construction-related materials on the job site to or from the job  
10 site;

11 2. "Commissioner" means the Commissioner of Labor;

12 3. "Contractor" means any sole proprietor, partnership, firm,  
13 corporation, limited liability company, association or other legal  
14 entity permitted by law to do business within the State of Oklahoma  
15 who engages in construction as defined in this act. "Contractor"  
16 includes a general contractor and a subcontractor;

17 4. "Department" means the Department of Labor;

18 5. "Employer" means any contractor that employs individuals  
19 deemed employees under Section 3 of this act; however, employer does  
20 not include the State of Oklahoma or its officers, agencies, or  
21 political subdivisions, or the federal government;

22 6. "Entity" means any contractor for which an individual is  
23 performing services and is not classified as an employee under

1 Section 3 of this act; however, entity does not include the State of  
2 Oklahoma or its officers, agencies, or political subdivisions or the  
3 federal government;

4 7. "Interested party" means a person with an interest in  
5 compliance with this act; and

6 8. "Performing services" means the performance of any  
7 constructing, altering, reconstructing, repairing, rehabilitating,  
8 refinishing, refurbishing, remodeling, remediating, renovating,  
9 custom fabricating, maintaining, landscaping, improving, wrecking,  
10 painting, decorating, demolishing, and adding to or subtracting from  
11 any building, structure, highway, roadway, street, bridge, alley,  
12 sewer, ditch, sewage disposal plant, waterworks, parking facility,  
13 railroad, excavation or other structure, project, development, real  
14 property or improvement, or to do any part thereof, whether or not  
15 the performance of the work herein described involves the addition  
16 to, or fabrication into, any structure, project, development, real  
17 property or improvement herein described of any material or article  
18 of merchandise. Construction shall also include moving  
19 construction-related materials on the job site to or from the job  
20 site.

21 SECTION 3. NEW LAW A new section of law to be codified  
22 in the Oklahoma Statutes as Section 703 of Title 40, unless there is  
23 created a duplication in numbering, reads as follows:

1           A. For the purposes of the Oklahoma Employee Classification  
2 Act, a person performing services for a contractor is deemed to be  
3 an employee of the employer, except as provided in subsections B and  
4 C of this section.

5           B. A person performing services for a contractor is deemed to  
6 be an employee of the contractor, unless it is shown that:

7           1. The person has been and will continue to be free from  
8 control or direction over the performance of the service for the  
9 contractor, both under the individual's contract of service and in  
10 fact;

11           2. The service performed by the person is outside the usual  
12 course of services performed by the contractor; and

13           3. The person is engaged in an independently established trade,  
14 occupation, profession or business; or

15           4. The person is deemed a legitimate sole proprietor or  
16 partnership under subsection C of this section.

17           C. The sole proprietor or partnership performing services for a  
18 contractor as a subcontractor is deemed legitimate if it is shown  
19 that:

20           1. The sole proprietor or partnership is performing the service  
21 free from the direction or control over the means and manner of  
22 providing the service, subject only to the right of the contractor  
23 for whom the service is provided to specify the desired result;

1           2. The sole proprietor or partnership is not subject to  
2 cancellation or destruction upon severance of the relationship with  
3 the contractor;

4           3. The sole proprietor or partnership has a substantial  
5 investment of capital in the sole proprietorship or partnership  
6 beyond ordinary tools and equipment and a personal vehicle;

7           4. The sole proprietor or partnership owns the capital goods  
8 and gains the profits and bears the losses of the sole  
9 proprietorship or partnership;

10          5. The sole proprietor or partnership makes its services  
11 available to the general public or the business community on a  
12 continuing basis;

13          6. The sole proprietor or partnership includes services  
14 rendered on a Federal Income Tax Schedule as an independent business  
15 or profession;

16          7. The sole proprietor or partnership performs services for the  
17 contractor under the sole proprietorship's or partnership's name;

18          8. When the services being provided require a license or  
19 permit, the sole proprietor or partnership obtains and pays for the  
20 license or permit in the sole proprietorship's or partnership's  
21 name;

22          9. The sole proprietor or partnership furnishes the tools and  
23 equipment necessary to provide the service;

1           10. If necessary, the sole proprietor or partnership hires its  
2 own employees without contractor approval, pays the employees  
3 without reimbursement from the contractor and reports the employees'  
4 income to the Internal Revenue Service;

5           11. The contractor does not represent the sole proprietorship  
6 or partnership as an employee of the contractor to its customers;  
7 and

8           12. The sole proprietor or partnership has the right to perform  
9 similar services for others on whatever basis and whenever it  
10 chooses.

11           D. Where a sole proprietor or partnership performing services  
12 for a contractor as a subcontractor is deemed not legitimate under  
13 subsection C of this section, the sole proprietorship or partnership  
14 shall be deemed to be performing services as an individual who is  
15 subject to the provisions of subsections A and B of this section for  
16 purposes of this act.

17           E. Subcontractors or lower-tiered contractors are subject to  
18 all provisions of this act.

19           F. A contractor shall not be liable under this act for any  
20 subcontractor's failure to properly classify persons performing  
21 services as employees, nor shall a subcontractor be liable for any  
22 lower-tiered subcontractor's failure to properly classify persons  
23 performing services as employees.

1 SECTION 4. NEW LAW A new section of law to be codified  
2 in the Oklahoma Statutes as Section 704 of Title 40, unless there is  
3 created a duplication in numbering, reads as follows:

4 An entity for whom one or more persons perform services who are  
5 not classified as employees under Section 3 of this act shall post  
6 and keep posted, in a conspicuous place on each job site where those  
7 persons perform services and in each of its offices, a notice  
8 prepared by the Department of Labor summarizing the requirements of  
9 this act. The Department shall furnish copies of summaries without  
10 charge to entities upon request.

11 SECTION 5. NEW LAW A new section of law to be codified  
12 in the Oklahoma Statutes as Section 705 of Title 40, unless there is  
13 created a duplication in numbering, reads as follows:

14 It is a violation of the Oklahoma Employee Classification Act  
15 for an employer or entity not to designate a person as an employee  
16 under Section 3 of this act, unless the employer or entity satisfies  
17 the provisions of Section 3 of this act.

18 SECTION 6. NEW LAW A new section of law to be codified  
19 in the Oklahoma Statutes as Section 706 of Title 40, unless there is  
20 created a duplication in numbering, reads as follows:

21 A. Any interested party may file a complaint with the  
22 Department of Labor against an entity or employer covered under this  
23 act if there is a reasonable belief that the entity or employer is

1 in violation of this act. It shall be the duty of the Department to  
2 enforce the provisions of this act. The Department shall have the  
3 power to conduct investigations in connection with the  
4 administration and enforcement of this act and any investigator with  
5 the Department shall be authorized to visit and inspect, at all  
6 reasonable times, any places covered by this act and shall be  
7 authorized to inspect, at all reasonable times, documents related to  
8 the determination of whether a person is an employee under Section 3  
9 of this act. The Commissioner of Labor or his or her representative  
10 may compel, by subpoena, the attendance and testimony of witnesses  
11 and the production of books, payrolls, records, papers, and other  
12 evidence in any investigation and may administer oaths to witnesses.

13 B. Whenever the Department believes upon investigation that  
14 there has been a violation of any of the provisions of this act or  
15 any rules or regulations promulgated under this act, the Department  
16 may:

17 1. Issue and cause to be served on any party an order to cease  
18 and desist from further violation of this act;

19 2. Take affirmative or other action as deemed reasonable to  
20 eliminate the effect of the violation;

21 3. Collect the amount of any wages, salary, employment-related  
22 taxes, employment benefits, or other compensation denied or lost to  
23 the individual; and

1        4. Assess any civil penalty allowed by this act.

2        The civil penalties assessed by the Department, as well as any  
3 other relief requested by the Department, shall be recoverable in an  
4 action brought in the name of the people of the State of Oklahoma by  
5 the Attorney General.

6        SECTION 7.        NEW LAW        A new section of law to be codified  
7 in the Oklahoma Statutes as Section 707 of Title 40, unless there is  
8 created a duplication in numbering, reads as follows:

9        Criminal violations of the Oklahoma Employee Classification Act  
10 shall be prosecuted by the Attorney General. The Department of  
11 Labor shall refer matters to the Attorney General upon determining  
12 that a criminal violation may have occurred. In all other  
13 proceedings the Department shall be represented by the Office of the  
14 Attorney General.

15        SECTION 8.        NEW LAW        A new section of law to be codified  
16 in the Oklahoma Statutes as Section 708 of Title 40, unless there is  
17 created a duplication in numbering, reads as follows:

18        Whenever it appears that any employer or entity has violated a  
19 valid order of the Department issued under the Oklahoma Employee  
20 Classification Act, the Commissioner of Labor may commence an action  
21 in the district court to enforce such order.

1           SECTION 9.           NEW LAW           A new section of law to be codified  
2 in the Oklahoma Statutes as Section 709 of Title 40, unless there is  
3 created a duplication in numbering, reads as follows:

4           An employer or entity that violates any of the provisions of the  
5 Oklahoma Employee Classification Act or any rule adopted under this  
6 act shall be subject to a civil penalty not to exceed One Thousand  
7 Five Hundred Dollars (\$1,500.00) for each violation found in the  
8 first audit by the Department. Following a first audit, an employer  
9 or entity shall be subject to a civil penalty not to exceed Two  
10 Thousand Five Hundred Dollars (\$2,500.00) for each repeat violation  
11 found by the Department within a five-year period. For purposes of  
12 this section, each violation of this act for each person and for  
13 each day the violation continues shall constitute a separate and  
14 distinct violation. In determining the amount of a penalty, the  
15 Commissioner shall consider the appropriateness of the penalty to  
16 the employer or entity charged, upon the determination of the  
17 gravity of the violations. A penalty may be enforced in a civil  
18 action filed in district court by the Commissioner of Labor, or a  
19 person aggrieved by a violation of this act or any rule adopted  
20 under this act. In any civil action brought by an interested party  
21 pursuant to this section, the district court shall award the  
22 prevailing party ten percent (10%) of the amount recovered. In such

1 case, the remaining amount recovered shall be submitted to the  
2 Commissioner of Labor.

3 SECTION 10. NEW LAW A new section of law to be codified  
4 in the Oklahoma Statutes as Section 710 of Title 40, unless there is  
5 created a duplication in numbering, reads as follows:

6 For any second or subsequent violation determined by the  
7 Department of Labor after notice and hearing pursuant to the  
8 Administrative Procedures Act, which is within five (5) years of an  
9 earlier violation, the Department shall add the employer's or  
10 entity's name to a list to be posted on the Department's official  
11 website. Upon such notice, the Department shall notify the  
12 violating employer or entity. No state contract shall be awarded to  
13 an employer or entity appearing on the list until four (4) years  
14 have elapsed from the date of the last violation. After the final  
15 decision of the Department, an employer whose name is on the list  
16 may appeal the final decision pursuant to the Administrative  
17 Procedures Act.

18 SECTION 11. NEW LAW A new section of law to be codified  
19 in the Oklahoma Statutes as Section 711 of Title 40, unless there is  
20 created a duplication in numbering, reads as follows:

21 A. Whoever willfully violates any of the provisions of the  
22 Oklahoma Employee Classification Act or any rule adopted under this  
23 act or whoever obstructs the Commissioner of Labor, or its

1 representatives, or any other person authorized to inspect places of  
2 employment under this act, shall be liable for penalties up to  
3 double the statutory amount.

4 B. Whoever willfully violates any of the provisions of this act  
5 or any rule adopted under this act shall be liable to the employee  
6 for punitive damages in an amount equal to the penalties assessed in  
7 subsection A of this section.

8 C. The penalty shall be imposed in cases in which an employer's  
9 or entity's conduct in violation of any of the provisions of this  
10 act is proven by a preponderance of the evidence to be willful. The  
11 penalty may be recovered in a civil action brought by the  
12 Commissioner of Labor in any district court. In any such action,  
13 the Commissioner of Labor shall be represented by the Attorney  
14 General.

15 SECTION 12. NEW LAW A new section of law to be codified  
16 in the Oklahoma Statutes as Section 712 of Title 40, unless there is  
17 created a duplication in numbering, reads as follows:

18 A. An interested party or person aggrieved by a violation of  
19 the Oklahoma Employee Classification Act or any rule adopted under  
20 this act by an employer or entity may file suit in district court,  
21 in the county where the alleged offense occurred or where any person  
22 who is party to the action resides, without regard to exhaustion of  
23 any alternative administrative remedies provided in this act.

1 Actions may be brought by one or more persons for and on behalf of  
2 themselves and other persons similarly situated. A person whose  
3 rights have been violated under this act by an employer or entity is  
4 entitled to collect:

5 1. The amount of any wages, salary, employment benefits, or  
6 other compensation denied or lost to the person by reason of the  
7 violation, plus an equal amount in liquidated damages;

8 2. Compensatory damages and an amount up to Five Hundred  
9 Dollars (\$500.00) for each violation of this act or any rule adopted  
10 under this act;

11 3. In the case of unlawful retaliation, all legal or equitable  
12 relief as may be appropriate; and

13 4. Attorney fees and costs.

14 B. The right of an interested party or aggrieved person to  
15 bring an action under this section terminates upon the passing of  
16 three (3) years from the final date of performing services for the  
17 employer or entity. This limitations period is tolled if an  
18 employer or entity has deterred a person's exercise of rights under  
19 this act.

20 SECTION 13. NEW LAW A new section of law to be codified  
21 in the Oklahoma Statutes as Section 713 of Title 40, unless there is  
22 created a duplication in numbering, reads as follows:

1           The Department of Labor may adopt administrative rules to  
2   implement and administer the Oklahoma Employee Classification Act.

3           SECTION 14. This act shall become effective November 1, 2010.

4   COMMITTEE REPORT BY: COMMITTEE ON BUSINESS & LABOR, dated 2-15-10 -  
5   DO PASS, As Amended and Coauthored.