

1 STATE OF OKLAHOMA

2 2nd Session of the 52nd Legislature (2010)

3 HOUSE BILL 2616

By: Proctor

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6 AS INTRODUCED

7 An Act relating to labor; creating the Oklahoma
8 Employee Classification Act; stating purpose;
9 defining terms; providing for applicability;
10 providing for status of individuals performing
11 service; requiring notice; providing for failure to
12 properly classify; providing for enforcement;
13 directing the Attorney General to prosecute
14 violations; providing for penalties; directing the
15 Department of Labor to adopt certain rules; providing
16 for codification; and providing an effective date.

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

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

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

24 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:

1 As used in the Oklahoma Employee Classification Act:

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

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

18 3. "Contractor" means any sole proprietor, partnership, firm,
19 corporation, limited liability company, association or other legal
20 entity permitted by law to do business within the State of Oklahoma
21 who engages in construction. "Contractor" includes a general
22 contractor and a subcontractor;

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

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

5 6. "Entity" means any contractor for which an individual is
6 performing services and is not classified as an employee under
7 Section 3 of this act; however, entity does not include the State of
8 Oklahoma or its officers, agencies, or political subdivisions or the
9 federal government;

10 7. "Interested party" means a person with an interest in
11 compliance with the Oklahoma Employee Classification Act; and

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

1 construction-related materials on the job site to or from the job
2 site.

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

6 A. For the purposes of the Oklahoma Employee Classification
7 Act, an individual performing services for a contractor is deemed to
8 be an employee of the employer except as provided in subsections B
9 and C of this section.

10 B. An individual performing services for a contractor is deemed
11 to be an employee of the contractor unless it is shown that:

12 1. The individual has been and will continue to be free from
13 control or direction over the performance of the service for the
14 contractor, both under the individual's contract of service and in
15 fact;

16 2. The service performed by the individual is outside the usual
17 course of services performed by the contractor; and

18 3. The individual is engaged in an independently established
19 trade, occupation, profession or business; or

20 4. The individual is deemed a legitimate sole proprietor or
21 partnership under subsection C of this section.

22 C. The sole proprietor or partnership performing services for a
23 contractor as a subcontractor is deemed legitimate if it is shown
24 that:

- 1 1. The sole proprietor or partnership is performing the service
2 free from the direction or control over the means and manner of
3 providing the service, subject only to the right of the contractor
4 for whom the service is provided to specify the desired result;
- 5 2. The sole proprietor or partnership is not subject to
6 cancellation or destruction upon severance of the relationship with
7 the contractor;
- 8 3. The sole proprietor or partnership has a substantial
9 investment of capital in the sole proprietorship or partnership
10 beyond ordinary tools and equipment and a personal vehicle;
- 11 4. The sole proprietor or partnership owns the capital goods
12 and gains the profits and bears the losses of the sole
13 proprietorship or partnership;
- 14 5. The sole proprietor or partnership makes its services
15 available to the general public or the business community on a
16 continuing basis;
- 17 6. The sole proprietor or partnership includes services
18 rendered on a Federal Income Tax Schedule as an independent business
19 or profession;
- 20 7. The sole proprietor or partnership performs services for the
21 contractor under the sole proprietorship's or partnership's name;
- 22 8. When the services being provided require a license or
23 permit, the sole proprietor or partnership obtains and pays for the
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1 license or permit in the sole proprietorship's or partnership's
2 name;

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

5 10. If necessary, the sole proprietor or partnership hires its
6 own employees without contractor approval, pays the employees
7 without reimbursement from the contractor and reports the employees'
8 income to the Internal Revenue Service;

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

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

15 D. If a sole proprietor or partnership performing services for
16 a contractor as a subcontractor is deemed not legitimate under
17 subsection C of this section, the sole proprietorship or partnership
18 shall be deemed an individual for purposes of the Oklahoma Employee
19 Classification Act.

20 E. Subcontractors or lower-tiered contractors are subject to
21 all provisions of the Oklahoma Employee Classification Act.

22 F. A contractor shall not be liable under the Oklahoma Employee
23 Classification Act for any subcontractor's failure to properly
24 classify persons performing services as employees, nor shall a

1 subcontractor be liable for any lower-tiered subcontractor's failure
2 to properly classify persons performing services as employees.

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

6 A. The Department of Labor shall post a summary of the
7 requirements of the Oklahoma Employee Classification Act on its
8 official website and on bulletin boards in each of its offices.

9 B. An entity for whom one or more individuals perform services
10 who are not classified as employees under Section 3 of this act
11 shall post and keep posted, in a conspicuous place on each job site
12 where those individuals perform services and in each of its offices,
13 a notice, prepared by the Department, summarizing the requirements
14 of the Oklahoma Employee Classification Act. The Department shall
15 furnish copies of summaries without charge to entities upon request.

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

19 It is a violation of the Oklahoma Employee Classification Act
20 for an employer or entity not to designate an individual as an
21 employee under Section 3 of this act unless the employer or entity
22 satisfies the provisions of Section 3 of this act.

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

4 A. Any interested party may file a complaint with the
5 Department of Labor against an entity or employer covered under the
6 Oklahoma Employee Classification Act if there is a reasonable belief
7 that the entity or employer is in violation of the Oklahoma Employee
8 Classification Act. It shall be the duty of the Department to
9 enforce the provisions of the Oklahoma Employee Classification Act.
10 The Department shall have the power to conduct investigations in
11 connection with the administration and enforcement of the Oklahoma
12 Employee Classification Act and any investigator with the Department
13 shall be authorized to visit and inspect, at all reasonable times,
14 any places covered by this act and shall be authorized to inspect,
15 at all reasonable times, documents related to the determination of
16 whether an individual is an employee under Section 3 of this act.
17 The Commissioner of Labor or a representative of the Commissioner
18 may compel, by subpoena, the attendance and testimony of witnesses
19 and the production of books, payrolls, records, papers, and other
20 evidence in any investigation and may administer oaths to witnesses.

21 B. Whenever the Department believes upon investigation that
22 there has been a violation of any of the provisions of the Oklahoma
23 Employee Classification Act or any rules or regulations promulgated
24 under the Oklahoma Employee Classification Act, the Department may:

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

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

5 3. Collect the amount of any wages, salary, employment
6 benefits, or other compensation denied or lost to the individual;
7 and

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

9 The civil penalties assessed by the Department as well as any
10 other relief requested by the Department shall be recoverable in an
11 action brought in the name of the people of the State of Oklahoma by
12 the Attorney General.

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

16 Criminal violations of the Oklahoma Employee Classification Act
17 shall be prosecuted by the Attorney General. The Department of
18 Labor shall refer matters to the Attorney General upon determining
19 that a criminal violation may have occurred. In all other
20 proceedings the Department shall be represented by the Office of the
21 Attorney General.

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

1 Whenever it appears that any employer or entity has violated a
2 valid order of the Department of Labor issued under the Oklahoma
3 Employee Classification Act, the Commissioner of Labor may commence
4 an action and obtain from the court an order commanding the employer
5 or entity to obey the order of the Department or be adjudged guilty
6 of contempt of court and punished accordingly.

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

10 An employer or entity that violates any of the provisions of the
11 Oklahoma Employee Classification Act or any rule promulgated
12 pursuant thereto shall be subject to a civil penalty not to exceed
13 One Thousand Five Hundred Dollars (\$1,500.00) for each violation
14 found in the first audit by the Department of Labor. Following a
15 first audit, an employer or entity shall be subject to a civil
16 penalty not to exceed Two Thousand Five Hundred Dollars (\$2,500.00)
17 for each repeat violation found by the Department within a five-year
18 period. For purposes of this section, each violation of the
19 Oklahoma Employee Classification Act for each person and for each
20 day the violation continues shall constitute a separate and distinct
21 violation. In determining the amount of a penalty, the Commissioner
22 of Labor shall consider the appropriateness of the penalty to the
23 employer or entity charged, upon the determination of the gravity of
24 the violations. The amount of the penalty, when finally determined,

1 may be recovered in a civil action filed in any circuit court by the
2 Commissioner, or a person aggrieved by a violation of the Oklahoma
3 Employee Classification Act or any rule adopted under the Oklahoma
4 Employee Classification Act. In any civil action brought by an
5 interested party pursuant to this section, the district court shall
6 award the interested party ten percent (10%) of the amount
7 recovered. In such case, the remaining amount recovered shall be
8 submitted to the Commissioner.

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

12 For any second or subsequent violation determined by the
13 Department of Labor which is within five (5) years of an earlier
14 violation, the Department shall add the employer or entity's name to
15 a list to be posted on the Department's official website. Upon such
16 notice, the Department shall notify the violating employer or
17 entity. No state contract shall be awarded to an employer or entity
18 appearing on the list until four (4) years have elapsed from the
19 date of the last violation.

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

23 A. Whoever willfully violates any of the provisions of the
24 Oklahoma Employee Classification Act or any rule promulgated

1 pursuant thereto or whoever obstructs the Commissioner of Labor, or
2 representatives of the Commissioner, or any other person authorized
3 to inspect places of employment under the Oklahoma Employee
4 Classification Act shall be liable for penalties up to double the
5 statutory amount.

6 B. Whoever willfully violates any of the provisions of the
7 Oklahoma Employee Classification Act or any rule promulgated
8 pursuant thereto shall be liable to the employee for punitive
9 damages in an amount equal to the penalties assessed in subsection A
10 of this section.

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

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

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

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

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

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

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

14 4. Attorney fees and costs.

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

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

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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.

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