

1 STATE OF OKLAHOMA

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

3 SENATE BILL 1937

By: Coates

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5
6 AS INTRODUCED

7 An Act relating to labor; creating the Oklahoma
8 Employee Classification Act; providing short title;
9 stating purpose; defining terms; providing for
10 applicability; providing for status of persons
11 performing service; providing exceptions to person's
12 employment status; providing status of sole
13 proprietor or partnership under certain conditions;
14 providing exception to legitimate subcontractor as
15 sole proprietor or partnership; making subcontractors
16 and lower-tiered contractors subject to certain
17 requirements; granting certain immunity from certain
18 liability for failure to properly classify certain
19 persons as employees; requiring certain notice be
20 posted in certain locations for certain purposes;
21 stating certain violation; providing exception for
22 not designating person as employee; authorizing
23 complaints to the Department of Labor for violations;
24 providing for enforcement of violations by the
Department of Labor; authorizing the Department of
Labor to conduct investigations and inspect documents
and places; authorizing Commissioner of Labor to
subpoena persons and compel evidence; authorizing
administration of oaths by Commission of Labor for
certain purpose; allowing the Department of Labor to
take certain action upon violation; allowing cease
and desist orders; allowing collection of
compensation denied or lost to certain persons;
authorizing assessment of civil penalties; allowing
the Attorney General to recover civil penalties in
court action; directing the Attorney General to
prosecute criminal violations; directing the
Department of Labor to refer criminal violations to
certain office for prosecution; providing
representation by the Office of the Attorney General
in certain proceedings; allowing the Commissioner of

1 Labor to commence court action to enforce orders of
2 the Department of Labor; stating maximum amounts for
3 civil penalties on first and subsequent violations;
4 calculating separate violations by number of days a
5 violation continues; allowing penalty to be in
6 response to gravity of violation; allowing aggrieved
7 person to file action to enforce certain penalty;
8 allowing certain percentage of award to prevailing
9 party; providing certain amount of court award to be
10 submitted to Commissioner of Labor; providing for
11 list of repeat violators; allowing certain list of
12 names to be posted on certain website; requiring
13 notice of certain inclusion and posting of name;
14 prohibiting state contracts with person on certain
15 list until certain period has elapsed; allowing
16 appeal of action to include or post name on certain
17 list; prohibiting obstruction of certain persons;
18 providing for double penalties; allowing punitive
19 damages; requiring preponderance of evidence for
20 certain proceeding; allowing aggrieved party to file
21 suit in district court; allowing certain right to
22 collect certain damages, costs and fees; providing
23 statute of limitations for certain action in
24 recovery; allowing certain tolling of certain rights
under certain circumstance; authorizing the
Department of Labor to promulgate rules; providing
for codification; and providing an 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.

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

4 As used in the Oklahoma Employee Classification Act:

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

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

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

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

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

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

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

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

1 to, or fabrication into, any structure, project, development, real
2 property or improvement herein described of any material or article
3 of merchandise. Construction shall also include moving
4 construction-related materials on the job site to or from the job
5 site.

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

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

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

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

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

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

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

1 C. The sole proprietor or partnership performing services for a
2 contractor as a subcontractor is deemed legitimate if it is shown
3 that:

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

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

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

14 4. The sole proprietor or partnership owns the capital goods
15 and gains the profits and bears the losses of the sole
16 proprietorship or partnership;

17 5. The sole proprietor or partnership makes its services
18 available to the general public or the business community on a
19 continuing basis;

20 6. The sole proprietor or partnership includes services
21 rendered on a Federal Income Tax Schedule as an independent business
22 or profession;

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

1 8. When the services being provided require a license or
2 permit, the sole proprietor or partnership obtains and pays for the
3 license or permit in the sole proprietorship's or partnership's
4 name;

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

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

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

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

17 D. Where a sole proprietor or partnership performing services
18 for a contractor as a subcontractor is deemed not legitimate under
19 subsection C of this section, the sole proprietorship or partnership
20 shall be deemed to be performing services as an individual who is
21 subject to the provisions of subsections A and B of this section for
22 purposes of this act.

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

1 F. A contractor shall not be liable under this act for any
2 subcontractor's failure to properly classify persons performing
3 services as employees, nor shall a subcontractor be liable for any
4 lower-tiered subcontractor's failure to properly classify persons
5 performing services as employees.

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

9 An entity for whom one or more persons perform services who are
10 not classified as employees under Section 3 of this act shall post
11 and keep posted, in a conspicuous place on each job site where those
12 persons perform services and in each of its offices, a notice
13 prepared by the Department of Labor summarizing the requirements of
14 this act. The Department shall furnish copies of summaries without
15 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 a person as an employee
21 under Section 3 of this act, unless the employer or entity satisfies
22 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 this
6 act if there is a reasonable belief that the entity or employer is
7 in violation of this act. It shall be the duty of the Department to
8 enforce the provisions of this act. The Department shall have the
9 power to conduct investigations in connection with the
10 administration and enforcement of this act and any investigator with
11 the Department shall be authorized to visit and inspect, at all
12 reasonable times, any places covered by this act and shall be
13 authorized to inspect, at all reasonable times, documents related to
14 the determination of whether a person is an employee under Section 3
15 of this act. The Commissioner of Labor or his or her representative
16 may compel, by subpoena, the attendance and testimony of witnesses
17 and the production of books, payrolls, records, papers, and other
18 evidence in any investigation and may administer oaths to witnesses.

19 B. Whenever the Department believes upon investigation that
20 there has been a violation of any of the provisions of this act or
21 any rules or regulations promulgated under this act, the Department
22 may:

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

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

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

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

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

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

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

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

23 Whenever it appears that any employer or entity has violated a
24 valid order of the Department issued under the Oklahoma Employee

1 Classification Act, the Commissioner of Labor may commence an action
2 in the district court to enforce such order.

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

6 An employer or entity that violates any of the provisions of the
7 Oklahoma Employee Classification Act or any rule adopted under this
8 act shall be subject to a civil penalty not to exceed One Thousand
9 Five Hundred Dollars (\$1,500.00) for each violation found in the
10 first audit by the Department. Following a first audit, an employer
11 or entity shall be subject to a civil penalty not to exceed Two
12 Thousand Five Hundred Dollars (\$2,500.00) for each repeat violation
13 found by the Department within a five-year period. For purposes of
14 this section, each violation of this act for each person and for
15 each day the violation continues shall constitute a separate and
16 distinct violation. In determining the amount of a penalty, the
17 Commissioner shall consider the appropriateness of the penalty to
18 the employer or entity charged, upon the determination of the
19 gravity of the violations. A penalty may be enforced in a civil
20 action filed in district court by the Commissioner of Labor, or a
21 person aggrieved by a violation of this act or any rule adopted
22 under this act. In any civil action brought by an interested party
23 pursuant to this section, the district court shall award the
24 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
24 representatives, or any other person authorized to inspect places of

1 employment under this act, shall be liable for penalties up to
2 double the statutory amount.

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

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

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

17 A. An interested party or person aggrieved by a violation of
18 the Oklahoma Employee Classification Act or any rule adopted under
19 this act by an employer or entity may file suit in district court,
20 in the county where the alleged offense occurred or where any person
21 who is party to the action resides, without regard to exhaustion of
22 any alternative administrative remedies provided in this act.
23 Actions may be brought by one or more persons for and on behalf of
24 themselves and other persons similarly situated. A person whose

1 rights have been violated under this act by an employer or entity is
2 entitled to collect:

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

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

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

11 4. Attorney fees and costs.

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

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

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

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

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