

1 STATE OF OKLAHOMA

2 2nd Session of the 53rd Legislature (2012)

3 COMMITTEE SUBSTITUTE

4 FOR

HOUSE BILL NO. 2479

By: Scott

5
6 COMMITTEE SUBSTITUTE

7
8 An Act relating to labor; creating the Oklahoma
9 Employee Classification Act; stating purpose;
10 defining terms; providing for applicability;
11 providing for qualifying conditions; authorizing
12 certain agencies to share information; providing for
13 posting of requirements; requiring notice; providing
14 for failure to properly classify; providing for
15 enforcement; directing the Attorney General to
16 prosecute violations; providing for penalties;
17 directing the Department of Labor to adopt certain
18 rules; providing for codification; and providing an
19 effective date.

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

21 SECTION 1. NEW LAW A new section of law to be codified
22 in the Oklahoma Statutes as Section 801 of Title 40, unless there is
23 created a duplication in numbering, reads as follows:

24 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 802 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, maintaining, 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 to or from a job site;

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

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

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

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

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

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

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

1 property or improvement herein described of any material or article
2 of merchandise.

3 SECTION 3. NEW LAW A new section of law to be codified
4 in the Oklahoma Statutes as Section 803 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, a worker is an employee of the contractor if the worker
8 qualifies for ten or more of the conditions stated in paragraphs 1
9 through 20 of this subsection. All other persons engaged in work
10 pursuant to the Oklahoma Employee Classification Act shall be
11 classified as sole proprietors or partnerships. The qualifying
12 conditions for consideration before determining classification as an
13 employee are:

14 1. An employee receives instructions about when, where and how
15 the work is to be performed;

16 2. Employees are trained by a more experienced employee or are
17 required to attend meetings or take training courses;

18 3. Services of an employee are merged into the firm's overall
19 operation, and the firm's success depends on those employee
20 services;

21 4. An employee's services must be rendered personally.
22 Employees do not hire their own substitutes or delegate work to
23 them;

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- 1 5. An employee may act as a foreman for the employer but, if
2 so, helpers are paid with the employer's funds;
- 3 6. An employee continues to work for the same employer month
4 after month or year after year;
- 5 7. An employee works "on call" or during hours and days as set
6 by the employer;
- 7 8. An employee devotes full-time service to the employer, or
8 the employer may have a priority on the employee's time;
- 9 9. Employment is indicated if the employer has the right to
10 mandate where services are performed;
- 11 10. An employee performs services in the order or sequence set
12 by the employer. This shows control by the employer;
- 13 11. An employee is required to submit regular oral or written
14 reports about the work in progress;
- 15 12. An employee is paid by the employer in regular amounts at
16 stated intervals, such as by the hour or week;
- 17 13. An employee's business and travel expenses are either paid
18 directly or reimbursed by the employer;
- 19 14. Employees are furnished all necessary tools, materials, and
20 equipment by their employer;
- 21 15. An employee has little or no investment in the business.
22 Instead, an employee is economically dependent on the employer;
- 23 16. An employee does not realize a profit or loss in the
24 business. Rather, employees are paid for services rendered;

1 17. An employee works for one employer at a time and may be
2 prohibited from joining a competitor;

3 18. An employee does not make his or her services available to
4 the public except through the employer's company;

5 19. An employee can be discharged at any time without liability
6 on the employer's part; and

7 20. An employee may quit work at any time without liability on
8 the employee's part.

9 B. If a sole proprietor or partnership performing services for
10 a contractor as a subcontractor is deemed not legitimate under
11 subsection A of this section, the sole proprietorship or partnership
12 shall be deemed an individual for purposes of the Oklahoma Employee
13 Classification Act.

14 C. Subcontractors or lower-tiered contractors are subject to
15 all provisions of the Oklahoma Employee Classification Act.

16 D. A contractor shall not be liable under the Oklahoma Employee
17 Classification Act for any subcontractor's failure to properly
18 classify persons performing services as employees, nor shall a
19 subcontractor be liable for any lower-tiered subcontractor's failure
20 to properly classify persons performing services as employees.

21 SECTION 4. NEW LAW A new section of law to be codified
22 in the Oklahoma Statutes as Section 804 of Title 40, unless there is
23 created a duplication in numbering, reads as follows:

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1 A. The Department of Labor, Oklahoma Tax Commission, Oklahoma
2 Workers' Compensation Court and Oklahoma Employment Security
3 Commission shall share information and coordinate investigative and
4 enforcement efforts.

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

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

15 SECTION 5. NEW LAW A new section of law to be codified
16 in the Oklahoma Statutes as Section 805 of Title 40, unless there is
17 created a duplication in numbering, reads as follows:

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

22 SECTION 6. NEW LAW A new section of law to be codified
23 in the Oklahoma Statutes as Section 806 of Title 40, unless there is
24 created a duplication in numbering, reads as follows:

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

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

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

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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
4 benefits, or other compensation denied or lost to the individual;
5 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 807 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 808 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 of Labor issued under the Oklahoma

1 Employee Classification Act, the Commissioner of Labor may commence
2 an action and obtain from the court an order commanding the employer
3 or entity to obey the order of the Department or be adjudged guilty
4 of contempt of court and punished accordingly.

5 SECTION 9. NEW LAW A new section of law to be codified
6 in the Oklahoma Statutes as Section 809 of Title 40, unless there is
7 created a duplication in numbering, reads as follows:

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

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

7 SECTION 10. NEW LAW A new section of law to be codified
8 in the Oklahoma Statutes as Section 810 of Title 40, unless there is
9 created a duplication in numbering, reads as follows:

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

18 SECTION 11. NEW LAW A new section of law to be codified
19 in the Oklahoma Statutes as Section 811 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 promulgated
23 pursuant thereto or whoever obstructs the Commissioner of Labor, or
24 representatives of the Commissioner, or any other person authorized

1 to inspect places of employment under the Oklahoma Employee
2 Classification Act shall be liable for penalties up to double the
3 statutory amount.

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

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

14 SECTION 12. NEW LAW A new section of law to be codified
15 in the Oklahoma Statutes as Section 812 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 promulgated
19 pursuant thereto by an employer or entity may file suit in district
20 court, in the county where the alleged offense occurred or where any
21 person who is party to the action resides, without regard to
22 exhaustion of any alternative administrative remedies provided in
23 the Oklahoma Employee Classification Act. Actions may be brought by
24 one or more persons for and on behalf of themselves and other

1 persons similarly situated. A person whose rights have been
2 violated under the Oklahoma Employee Classification Act by an
3 employer or entity is entitled to collect:

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

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

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

12 4. Attorney fees and costs.

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

19 SECTION 13. NEW LAW A new section of law to be codified
20 in the Oklahoma Statutes as Section 813 of Title 40, unless there is
21 created a duplication in numbering, reads as follows:

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

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SECTION 14. This act shall become effective November 1, 2012.

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