

1 **HOUSE OF REPRESENTATIVES - FLOOR VERSION**

2 STATE OF OKLAHOMA

3 2nd Session of the 53rd Legislature (2012)

4 COMMITTEE SUBSTITUTE
5 FOR
6 HOUSE BILL NO. 2479

By: Scott

7 COMMITTEE SUBSTITUTE

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
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1 who engages in construction. "Contractor" includes a general
2 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 the Oklahoma Employee Classification 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

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BOLD FACE CAPITALIZED language denotes Committee Amendments.
~~Strike thru~~ language denotes deletion from present Statutes.

1 the performance of the work herein described involves the addition
2 to, or fabrication into, any structure, project, development, real
3 property or improvement herein described of any material or article
4 of merchandise.

5 SECTION 3. NEW LAW A new section of law to be codified
6 in the Oklahoma Statutes as Section 803 of Title 40, unless there is
7 created a duplication in numbering, reads as follows:

8 A. For the purposes of the Oklahoma Employee Classification
9 Act, a worker is an employee of the contractor if the worker
10 qualifies for ten or more of the conditions stated in paragraphs 1
11 through 20 of this subsection. All other persons engaged in work
12 pursuant to the Oklahoma Employee Classification Act shall be
13 classified as sole proprietors or partnerships. The qualifying
14 conditions for consideration before determining classification as an
15 employee are:

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

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

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

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- 1 4. An employee's services must be rendered personally.
2 Employees do not hire their own substitutes or delegate work to
3 them;
- 4 5. An employee may act as a foreman for the employer but, if
5 so, helpers are paid with the employer's funds;
- 6 6. An employee continues to work for the same employer month
7 after month or year after year;
- 8 7. An employee works "on call" or during hours and days as set
9 by the employer;
- 10 8. An employee devotes full-time service to the employer, or
11 the employer may have a priority on the employee's time;
- 12 9. Employment is indicated if the employer has the right to
13 mandate where services are performed;
- 14 10. An employee performs services in the order or sequence set
15 by the employer. This shows control by the employer;
- 16 11. An employee is required to submit regular oral or written
17 reports about the work in progress;
- 18 12. An employee is paid by the employer in regular amounts at
19 stated intervals, such as by the hour or week;
- 20 13. An employee's business and travel expenses are either paid
21 directly or reimbursed by the employer;
- 22 14. Employees are furnished all necessary tools, materials, and
23 equipment by their employer;

1 15. An employee has little or no investment in the business.
2 Instead, an employee is economically dependent on the employer;

3 16. An employee does not realize a profit or loss in the
4 business. Rather, employees are paid for services rendered;

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

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

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

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

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

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

20 D. A contractor shall not be liable under the Oklahoma Employee
21 Classification Act for any subcontractor's failure to properly
22 classify persons performing services as employees, nor shall a
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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 804 of Title 40, unless there is
5 created a duplication in numbering, reads as follows:

6 A. The Department of Labor, Oklahoma Tax Commission, Oklahoma
7 Workers' Compensation Court and Oklahoma Employment Security
8 Commission shall share information and coordinate investigative and
9 enforcement efforts.

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

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

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

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

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

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

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1 and the production of books, payrolls, records, papers, and other
2 evidence in any investigation and may administer oaths to witnesses.

3 B. Whenever the Department believes upon investigation that
4 there has been a violation of any of the provisions of the Oklahoma
5 Employee Classification Act or any rules or regulations promulgated
6 under the Oklahoma Employee Classification Act, the Department may:

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

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

11 3. Collect the amount of any wages, salary, employment
12 benefits, or other compensation denied or lost to the individual;
13 and

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

15 The civil penalties assessed by the Department as well as any
16 other relief requested by the Department shall be recoverable in an
17 action brought in the name of the people of the State of Oklahoma by
18 the Attorney General.

19 SECTION 7. NEW LAW A new section of law to be codified
20 in the Oklahoma Statutes as Section 807 of Title 40, unless there is
21 created a duplication in numbering, reads as follows:

22 Criminal violations of the Oklahoma Employee Classification Act
23 shall be prosecuted by the Attorney General. The Department of
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1 Labor shall refer matters to the Attorney General upon determining
2 that a criminal violation may have occurred. In all other
3 proceedings the Department shall be represented by the Office of the
4 Attorney General.

5 SECTION 8. NEW LAW A new section of law to be codified
6 in the Oklahoma Statutes as Section 808 of Title 40, unless there is
7 created a duplication in numbering, reads as follows:

8 Whenever it appears that any employer or entity has violated a
9 valid order of the Department of Labor issued under the Oklahoma
10 Employee Classification Act, the Commissioner of Labor may commence
11 an action and obtain from the court an order commanding the employer
12 or entity to obey the order of the Department or be adjudged guilty
13 of contempt of court and punished accordingly.

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

17 An employer or entity that violates any of the provisions of the
18 Oklahoma Employee Classification Act or any rule promulgated
19 pursuant thereto shall be subject to a civil penalty not to exceed
20 One Thousand Five Hundred Dollars (\$1,500.00) for each violation
21 found in the first audit by the Department of Labor. Following a
22 first audit, an employer or entity shall be subject to a civil
23 penalty not to exceed Two Thousand Five Hundred Dollars (\$2,500.00)

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1 for each repeat violation found by the Department within a five-year
2 period. For purposes of this section, each violation of the
3 Oklahoma Employee Classification Act for each person and for each
4 day the violation continues shall constitute a separate and distinct
5 violation. In determining the amount of a penalty, the Commissioner
6 of Labor shall consider the appropriateness of the penalty to the
7 employer or entity charged, upon the determination of the gravity of
8 the violations. The amount of the penalty, when finally determined,
9 may be recovered in a civil action filed in any circuit court by the
10 Commissioner, or a person aggrieved by a violation of the Oklahoma
11 Employee Classification Act or any rule adopted under the Oklahoma
12 Employee Classification Act. In any civil action brought by an
13 interested party pursuant to this section, the district court shall
14 award the interested party ten percent (10%) of the amount
15 recovered. In such case, the remaining amount recovered shall be
16 submitted to the Commissioner.

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

20 For any second or subsequent violation determined by the
21 Department of Labor which is within five (5) years of an earlier
22 violation, the Department shall add the employer or entity's name to
23 a list to be posted on the Department's official website. Upon such
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1 notice, the Department shall notify the violating employer or
2 entity. No state contract shall be awarded to an employer or entity
3 appearing on the list until four (4) years have elapsed from the
4 date of the last violation.

5 SECTION 11. NEW LAW A new section of law to be codified
6 in the Oklahoma Statutes as Section 811 of Title 40, unless there is
7 created a duplication in numbering, reads as follows:

8 A. Whoever willfully violates any of the provisions of the
9 Oklahoma Employee Classification Act or any rule promulgated
10 pursuant thereto or whoever obstructs the Commissioner of Labor, or
11 representatives of the Commissioner, or any other person authorized
12 to inspect places of employment under the Oklahoma Employee
13 Classification Act shall be liable for penalties up to double the
14 statutory amount.

15 B. Whoever willfully violates any of the provisions of the
16 Oklahoma Employee Classification Act or any rule promulgated
17 pursuant thereto shall be liable to the employee for punitive
18 damages in an amount equal to the penalties assessed in subsection A
19 of this section.

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

3 SECTION 12. NEW LAW A new section of law to be codified
4 in the Oklahoma Statutes as Section 812 of Title 40, unless there is
5 created a duplication in numbering, reads as follows:

6 A. An interested party or person aggrieved by a violation of
7 the Oklahoma Employee Classification Act or any rule promulgated
8 pursuant thereto by an employer or entity may file suit in district
9 court, in the county where the alleged offense occurred or where any
10 person who is party to the action resides, without regard to
11 exhaustion of any alternative administrative remedies provided in
12 the Oklahoma Employee Classification Act. Actions may be brought by
13 one or more persons for and on behalf of themselves and other
14 persons similarly situated. A person whose rights have been
15 violated under the Oklahoma Employee Classification Act by an
16 employer or entity is entitled to collect:

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

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

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

3 4. Attorney fees and costs.

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

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

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

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

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17 COMMITTEE REPORT BY: COMMITTEE ON JUDICIARY, dated 02/28/2012 - DO
18 PASS, As Amended.

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