



95TH GENERAL ASSEMBLY

State of Illinois

2007 and 2008

HB1795

Introduced 2/23/2007, by Rep. Harry Osterman

SYNOPSIS AS INTRODUCED:

See Index

Creates the Employee Classification Act. Provides that an individual performing services for a contractor is deemed to be an employee of the employer. Provides that an individual performing services for a contractor is deemed to be an employee of the contractor unless it is shown that: (1) the individual has been and will continue to be free from control or direction over the performance of the service for the contractor, both under the individual's contract of service and in fact; (2) the service performed by the individual is outside the usual course of services performed by the contractor; and (3) the individual is engaged in an independently established trade, occupation, profession or business; or (4) the individual is deemed a legitimate sole proprietor or partnership. Provides that subcontractors or lower tiered contractors are subject to all provisions of the Act. Provides that the Department of Labor shall post a summary of the requirements of this Act in English, Spanish, and Polish on its official web site and on bulletin boards in each of its offices. Provides that it is a violation of the Act for an employer or entity not to designate an individual as an employee under the Act unless the employer or entity satisfies the provisions of the Act. Provides for civil remedies and civil penalties. Amends various Acts to make conforming changes. Effective January 1, 2008.

LRB095 08260 RLC 28432 b

CORRECTIONAL
BUDGET AND
IMPACT NOTE ACT
MAY APPLY

FISCAL NOTE ACT
MAY APPLY

1 AN ACT concerning employment.

2 **Be it enacted by the People of the State of Illinois,**
3 **represented in the General Assembly:**

4 Section 1. Short title. This Act may be cited as the
5 Employee Classification Act.

6 Section 3. Purpose. This Act is intended to address the
7 practice of misclassifying employees as independent
8 contractors.

9 Section 5. Definitions. As used in this Act:

10 "Construction" means any construction, alteration,
11 reconstruction, repair, rehabilitation, refinishing,
12 refurbishing, remodeling, remediation, renovation, custom
13 fabricating, maintenance, landscaping, improving, moving,
14 wrecking, painting, decorating, demolishing, and adding to or
15 subtracting from any building, structure, highway, roadway,
16 street, bridge, alley, sewer, ditch, sewage disposal plant,
17 water works, parking facility, railroad, excavation or other
18 structure, project, development, real property or improvement,
19 or to do any part thereof, whether or not the performance of
20 the work herein described involves the addition to, or
21 fabrication into, any structure, project, development, real
22 property or improvement herein described of any material or

1 article of merchandise.

2 "Contractor" means any sole proprietor, partnership, firm,
3 corporation, limited liability company, association or other
4 legal entity permitted by law to do business within the State
5 of Illinois who engages in construction as defined in this Act.

6 "Contractor" includes a general contractor and a
7 subcontractor.

8 "Department" means the Department of Labor.

9 "Director" means the Director of the Department of Labor.

10 "Employer" means any contractor that employs individuals
11 deemed employees under Section 10 of this Act; however,
12 "employer" does not include (i) the State of Illinois or its
13 officers, agencies, or political subdivisions or (ii) the
14 federal government.

15 "Entity" means any contractor for which an individual is
16 performing services and is not classified as an employee under
17 Section 10 of this Act; however, "entity" does not include (i)
18 the State of Illinois or its officers, agencies, or political
19 subdivisions or (ii) the federal government.

20 "Interested party" means a person with an interest in
21 compliance with this Act. "Performing Services" means the
22 performance of any construction, alteration, reconstruction,
23 repair, rehabilitation, refinishing, refurbishing, remodeling,
24 remediation, renovation, custom fabricating, maintenance,
25 landscaping, improving, moving, wrecking, painting,
26 decorating, demolishing, and adding to or subtracting from any

1 building, structure, highway, roadway, street, bridge, alley,
2 sewer, ditch, sewage disposal plant, water works, parking
3 facility, railroad, excavation or other structure, project,
4 development, real property or improvement, or to do any part
5 thereof, whether or not the performance of the work herein
6 described involves the addition to, or fabrication into, any
7 structure, project, development, real property or improvement
8 herein described of any material or article of merchandise.

9 Section 10. Applicability; status of individuals
10 performing service.

11 (a) For the purposes of this Act, an individual performing
12 services for a contractor is deemed to be an employee of the
13 employer except as provided in subsections (b) and (c) of this
14 Section.

15 (b) An individual performing services for a contractor is
16 deemed to be an employee of the contractor unless it is shown
17 that:

18 (1) the individual has been and will continue to be
19 free from control or direction over the performance of the
20 service for the contractor, both under the individual's
21 contract of service and in fact;

22 (2) the service performed by the individual is outside
23 the usual course of services performed by the contractor;
24 and

25 (3) the individual is engaged in an independently

1 established trade, occupation, profession or business; or

2 (4) the individual is deemed a legitimate sole
3 proprietor or partnership under subsection (c) of this
4 Section.

5 (c) The sole proprietor or partnership performing services
6 for a contractor as a subcontractor is deemed legitimate if it
7 is shown that:

8 (1) the sole proprietor or partnership is performing
9 the service free from the direction or control over the
10 means and manner of providing the service, subject only to
11 the right of the contractor for whom the service is
12 provided to specify the desired result;

13 (2) the sole proprietor or partnership is not subject
14 to cancellation or destruction upon severance of the
15 relationship with the contractor;

16 (3) the sole proprietor or partnership has a
17 substantial investment of capital in the sole
18 proprietorship or partnership beyond ordinary tools and
19 equipment and a personal vehicle;

20 (4) the sole proprietor or partnership owns the capital
21 goods and gains the profits and bears the losses of the
22 sole proprietorship or partnership;

23 (5) the sole proprietor or partnership makes its
24 services available to the general public or the business
25 community on a continuing basis;

26 (6) the sole proprietor or partnership includes

1 services rendered on a Federal Income Tax Schedule as an
2 independent business or profession;

3 (7) the sole proprietor or partnership performs
4 services for the contractor under the sole
5 proprietorship's or partnership's name;

6 (8) when the services being provided require a license
7 or permit, the sole proprietor or partnership obtains and
8 pays for the license or permit in the sole proprietorship's
9 or partnership's name;

10 (9) the sole proprietor or partnership furnishes the
11 tools and equipment necessary to provide the service;

12 (10) if necessary, the sole proprietor or partnership
13 hires its own employees' without contractor approval, pays
14 the employees' without reimbursement from the contractor
15 and reports the employees' income to the Internal Revenue
16 Service;

17 (11) the contractor does not represent the sole
18 proprietorship or partnership as an employee of the
19 contractor to its customers; and

20 (12) the sole proprietor or partnership has the right
21 to perform similar services for others on whatever basis
22 and whenever it chooses.

23 (d) Where a sole proprietor or partnership performing
24 services for a contractor as a subcontractor is deemed not
25 legitimate under subsection (c) of this Section, the sole
26 proprietorship or partnership shall be deemed an individual for

1 purposes of this Act.

2 (e) Subcontractors or lower tiered contractors are subject
3 to all provisions of this Act.

4 (f) A contractor shall not be liable under this Act for any
5 subcontractor's failure to properly classify persons
6 performing services as employees, nor shall a subcontractor be
7 liable for any lower tiered subcontractor's failure to properly
8 classify persons performing services as employees.

9 Section 15. Notice.

10 (a) The Department shall post a summary of the requirements
11 of this Act in English, Spanish, and Polish on its official web
12 site and on bulletin boards in each of its offices.

13 (b) An entity for whom one or more individuals perform
14 services who are not classified as employees under Section 10
15 of this Act shall post and keep posted, in a conspicuous place
16 on each job site where those individuals perform services and
17 in each of its offices, a notice in English, Spanish, and
18 Polish, prepared by the Department, summarizing the
19 requirements of this Act. The Department shall furnish copies
20 of summaries without charge to entities upon request.

21 Section 20. Failure to properly designate or classify
22 individuals performing services as employees. It is a violation
23 of this Act for an employer or entity not to designate an
24 individual as an employee under Section 10 of this Act unless

1 the employer or entity satisfies the provisions of Section 10
2 of this Act.

3 Section 25. Enforcement.

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

21 (b) Whenever the Department believes upon investigation
22 that there has been a violation of any of the provisions of
23 this Act or any rules or regulations promulgated under this
24 Act, the Department may: (i) issue and cause to be served on
25 any party an order to cease and desist from further violation

1 of the Act, (ii) take affirmative or other action as deemed
2 reasonable to eliminate the effect of the violation, (iii)
3 collect the amount of any wages, salary, employment benefits,
4 or other compensation denied or lost to the individual, and
5 (iv) assess any civil penalty allowed by this Act. The civil
6 penalties assessed by the Department as well as any other
7 relief requested by the Department shall be recoverable in an
8 action brought in the name of the people of the State of
9 Illinois by the Attorney General.

10 Section 30. Attorney General; State's Attorneys. Criminal
11 violations of this Act shall be prosecuted by the Attorney
12 General or the appropriate States Attorney. The Department
13 shall refer matters to the Attorney General and the appropriate
14 State's Attorney upon determining that a criminal violation may
15 have occurred. In all other proceedings the Department shall be
16 represented by the Attorney General's Office.

17 Section 35. Contempt. Whenever it appears that any employer
18 or entity has violated a valid order of the Department issued
19 under this Act, the Director of Labor may commence an action
20 and obtain from the court an order commanding the employer or
21 entity to obey the order of the Department or be adjudged
22 guilty of contempt of court and punished accordingly.

23 Section 40. Penalties. An employer or entity that violates

1 any of the provisions of this Act or any rule adopted under
2 this Act shall be subject to a civil penalty not to exceed
3 \$1,500 for each violation found in the first audit by the
4 Department. Following a first audit, an employer or entity
5 shall be subject to a civil penalty not to exceed \$2,500 for
6 each repeat violation found by the Department within a 5 year
7 period. For purposes of this Section, each violation of this
8 Act for each person and for each day the violation continues
9 shall constitute a separate and distinct violation. In
10 determining the amount of a penalty, the Director shall
11 consider the appropriateness of the penalty to the employer or
12 entity charged, upon the determination of the gravity of the
13 violations. The amount of the penalty, when finally determined,
14 may be recovered in a civil action filed in any circuit court
15 by the Director of Labor, or a person aggrieved by a violation
16 of this Act or any rule adopted under this Act. In any civil
17 action brought by an interested party pursuant to this Section,
18 the circuit court shall award the interested party 10% of the
19 amount recovered. In such case, the remaining amount recovered
20 shall be submitted to the Director of Labor. Any uncollected
21 amount shall be subject to the provisions of the Illinois State
22 Collection Act of 1986.

23 Section 42. Debarments. For any second or subsequent
24 violation determined by the Department which is within 5 years
25 of an earlier violation, the Department shall add the employer

1 or entity's name to a list to be posted on the Department's
2 official website. Upon such notice, the Department shall notify
3 the violating employer or entity. No state contract shall be
4 awarded to an employer or entity appearing on the list until 4
5 years have elapsed from the date of the last violation.

6 Section 45. Willful violations.

7 (a) Whoever willfully violates any of the provisions of
8 this Act or any rule adopted under this Act or whoever
9 obstructs the Director of Labor, or his or her representatives,
10 or any other person authorized to inspect places of employment
11 under this Act shall be liable for penalties up to double the
12 statutory amount.

13 (b) Whoever willfully violates any of the provisions of
14 this Act or any rule adopted under this Act shall be liable to
15 the employee for punitive damages in an amount equal to the
16 penalties assessed in subsection (a) of this Section.

17 (c) The penalty shall be imposed in cases in which an
18 employer or entity's conduct is proven by a preponderance of
19 the evidence to be willful. The penalty may be recovered in a
20 civil action brought by the Director of Labor in any circuit
21 court. In any such action, the Director of Labor shall be
22 represented by the Attorney General. Any uncollected amount
23 shall be subject to the provisions of the Illinois State
24 Collection Act of 1986.

25 (d) An entity or employer that willfully violates any

1 provision of this Act or any rule adopted under this Act
2 commits a Class C misdemeanor. An entity or employer that
3 commits a second or subsequent violation within a 5 year period
4 commits a Class 4 felony.

5 Section 50. Employee Classification Fund. All moneys
6 received by the Department as fees and civil penalties under
7 this Act shall be deposited into the Employee Classification
8 Fund and shall be used, subject to appropriation by the General
9 Assembly, by the Department for administration, investigation,
10 and other expenses incurred in carrying out its powers and
11 duties under this Act. The Department shall hire as many
12 investigators and other personnel as may be necessary to carry
13 out the purposes of this Act. Any moneys in the Fund at the end
14 of a fiscal year in excess of those moneys necessary for the
15 Department to carry out its powers and duties under this Act
16 shall be available to the Department for the next fiscal year
17 for any of the Department's duties.

18 Section 55. Retaliation.

19 (a) It is a violation of this Act for an employer or
20 entity, or any agent of an employer or entity, to retaliate
21 through discharge or in any other manner against any person for
22 exercising any rights granted under this Act. Such retaliation
23 shall subject an employer or entity to civil penalties pursuant
24 to this Act or a private cause of action, or both.

1 (b) It is a violation of this Act for an employer or entity
2 to retaliate against a person for:

3 (1) making a complaint to an employer or entity, to a
4 co-worker, to a community organization, before a public
5 hearing, or to a State or federal agency that rights
6 guaranteed under this Act have been violated;

7 (2) causing to be instituted any proceeding under or
8 related to this Act; or

9 (3) testifying or preparing to testify in an
10 investigation or proceeding under this Act.

11 Section 60. Private right of action.

12 (a) An interested party or person aggrieved by a violation
13 of this Act or any rule adopted under this Act by an employer
14 or entity may file suit in circuit court, in the county where
15 the alleged offense occurred or where any person who is party
16 to the action resides, without regard to exhaustion of any
17 alternative administrative remedies provided in this Act.
18 Actions may be brought by one or more persons for and on behalf
19 of themselves and other persons similarly situated. A person
20 whose rights have been violated under this Act by an employer
21 or entity is entitled to collect:

22 (1) the amount of any wages, salary, employment
23 benefits, or other compensation denied or lost to the
24 person by reason of the violation, plus an equal amount in
25 liquidated damages;

1 (2) compensatory damages and an amount up to \$500 for
2 each violation of this Act or any rule adopted under this
3 Act;

4 (3) in the case of unlawful retaliation, all legal or
5 equitable relief as may be appropriate; and

6 (4) attorney's fees and costs.

7 (c) The right of an interested party or aggrieved person to
8 bring an action under this Section terminates upon the passing
9 of 3 years from the final date of performing services to the
10 employer or entity. This limitations period is tolled if an
11 employer or entity has deterred a person's exercise of rights
12 under this Act.

13 Section 65. Rulemaking. The Department may adopt
14 reasonable rules to implement and administer this Act. For
15 purposes of this Act, the General Assembly finds that the
16 adoption of rules to implement this Act is deemed an emergency
17 and necessary for the public interest and welfare.

18 Section 70. No waivers.

19 (a) There shall be no waiver of any provision of this Act.

20 (b) It is a Class C misdemeanor for an employer to attempt
21 to induce any individual to waive any provision of this Act.

22 Section 75. Cooperation. The Department of Labor, the
23 Department of Employment Security, the Department of Revenue,

1 and the Illinois Workers' Compensation Commission shall
2 cooperate under this Act by sharing information concerning any
3 suspected misclassification by an employer or entity of one or
4 more of its employees as independent contractors. Upon
5 determining that an employer or entity has misclassified
6 employees as independent contractors in violation of this Act,
7 the Department shall notify the Department of Employment
8 Security, the Department of Revenue, the office of the State
9 Comptroller, and the Illinois Workers' Compensation Commission
10 who shall be obliged to check such employer or entity's
11 compliance with their laws, utilizing their own definitions,
12 standards, and procedures.

13 Section 80. Effect of Final Order. Any finding made
14 pursuant to this Act is for the purpose of enforcing this Act
15 and may not be admissible or binding against a party in any
16 other proceeding.

17 Section 900. The State Comptroller Act is amended by adding
18 Section 9.06 as follows:

19 (15 ILCS 405/9.06 new)

20 Sec. 9.06. Misclassification of employees as independent
21 contractors. The Department of Labor, the Department of
22 Employment Security, the Department of Revenue, the Office of
23 the State Comptroller, and the Illinois Workers' Compensation

1 Commission shall cooperate under the Employee Classification
2 Act by sharing information concerning any suspected
3 misclassification by an employer or entity, as defined in the
4 Employee Classification Act, or one or more employees as
5 independent contractors.

6 Section 901. The Department of Employment Security Law of
7 the Civil Administrative Code of Illinois is amended by adding
8 Section 1005-160 as follows:

9 (20 ILCS 1005/1005-160 new)

10 Sec. 1005-160. Misclassification of employees as
11 independent contractors. The Department of Labor, the
12 Department of Employment Security, the Department of Revenue,
13 the office of the State Comptroller, and the Illinois Workers'
14 Compensation Commission shall cooperate under the Employee
15 Classification Act by sharing information concerning any
16 suspected misclassification by an employer or entity, as
17 defined in the Employee Classification Act, of one or more
18 employees as independent contractors.

19 Section 905. The Department of Labor Law of the Civil
20 Administrative Code of Illinois is amended by adding Section
21 1505-125 as follows:

22 (20 ILCS 1505/1505-125 new)

1 Sec. 1505-125. Misclassification of employees as
2 independent contractors. The Department of Labor, the
3 Department of Employment Security, the Department of Revenue,
4 the office of the State Comptroller and the Illinois Workers'
5 Compensation Commission shall cooperate under the Employee
6 Classification Act by sharing information concerning any
7 suspected misclassification by an employer or entity, as
8 defined in the Employee Classification Act, of one or more
9 employees as independent contractors.

10 Section 910. The Department of Revenue Law of the Civil
11 Administrative Code of Illinois is amended by adding Section
12 2505-750 as follows:

13 (20 ILCS 2505/2505-750 new)

14 Sec. 2505-750. Misclassification of employees as
15 independent contractors. The Department of Labor, the
16 Department of Employment Security, the Department of Revenue,
17 the office of the State Comptroller, and the Illinois Workers'
18 Compensation Commission shall cooperate under the Employee
19 Classification Act by sharing information concerning any
20 suspected misclassification by an employer or entity, as
21 defined in the Employee Classification Act, of one or more
22 employees as independent contractors.

23 Section 915. The State Finance Act is amended by adding

1 Section 5.675 as follows:

2 (30 ILCS 105/5.675 new)

3 Sec. 5.675. The Employee Classification Fund.

4 Section 920. The Illinois Procurement Code is amended by
5 changing Section 50-70 as follows:

6 (30 ILCS 500/50-70)

7 Sec. 50-70. Additional provisions. This Code is subject to
8 applicable provisions of the following Acts:

9 (1) Article 33E of the Criminal Code of 1961;

10 (2) the Illinois Human Rights Act;

11 (3) the Discriminatory Club Act;

12 (4) the Illinois Governmental Ethics Act;

13 (5) the State Prompt Payment Act;

14 (6) the Public Officer Prohibited Activities Act; ~~and~~

15 (7) the Drug Free Workplace Act; and -

16 (8) the Employee Classification Act.

17 (Source: P.A. 90-572, eff. 2-6-98.)

18 Section 925. The Workers' Compensation Act is amended by
19 adding Section 26.1 as follows:

20 (820 ILCS 305/26.1 new)

21 Sec. 26.1. Misclassification of employees as independent

1 contractors. The Department of Labor, the Department of
2 Employment Security, the Department of Revenue, the office of
3 the State Comptroller, and the Illinois Workers' Compensation
4 Commission shall cooperate under the Employee Classification
5 Act by sharing information concerning any suspected
6 misclassification by an employer or entity, as defined in the
7 Employee Classification Act, of one or more employees as
8 independent contractors.

9 Section 990. Severability. The provisions of this Act are
10 severable under Section 1.31 of the Statute on Statutes.

11 Section 999. Effective date. This Act takes effect January
12 1, 2008.

1 INDEX

2 Statutes amended in order of appearance

3 New Act

4 15 ILCS 405/9.06 new

5 20 ILCS 1005/1005-160 new

6 20 ILCS 1505/1505-125 new

7 20 ILCS 2505/2505-750 new

8 30 ILCS 105/5.675 new

9 30 ILCS 500/50-70

10 820 ILCS 305/26.1 new