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SENATE BILL NO. 34

Offered January 13, 2010

Prefiled January 4, 2010

A *BILL to amend the Code of Virginia by adding in Chapter 3 of Title 40.1 an article numbered 1.2, consisting of sections numbered 40.1-28.13 through 40.1-28.22, relating to the failure to properly classify employees; Worker Misclassification Act; penalties.*

Patron—Lucas

Referred to Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 3 of Title 40.1 an article numbered 1.2, consisting of sections numbered 40.1-28.13 through 40.1-28.22, as follows:

*Article 1.2.**Worker Misclassification Act.**§ 40.1-28.13. Definitions.*

As used in this article, unless the context requires otherwise:

"Employer" means any individual, partnership, association, joint stock company, corporation, business trust or any other person or groups of persons acting directly or indirectly in the interest of an employer in relation to an employee.

"Performing Services" means the performance of any task related to the business engaged in by an Employer.

§ 40.1-28.14. Classification of employees.

A. For the purposes of this title, Title 60.2, and Title 65.2, if an individual performs services for an employer for remuneration, that individual shall be considered an employee of the party which pays that remuneration unless and until it is shown to the satisfaction of the Department that:

1. The individual has been and will continue to be free from direction and control of the employer, both under his contract of service and in fact;

2. The service is outside the usual course of the business of the employer; and

3. The individual is customarily engaged in an independently established trade, occupation, profession, or business, both under his contract of service and in fact.

B. The failure to withhold federal or state income taxes or to pay unemployment compensation contributions or workers' compensation premiums with respect to an individual's wages shall not be considered in making a determination under this subsection A.

C. In making determinations under subdivision A 1, employee status will be found where the control exercised by the party paying remuneration is a general one, exercised directly or indirectly, over the physical activities of the purported employee and need not extend to all the details of the physical performance of the duties performed for the employer.

§ 40.1-28.15. Criminal penalties.

Any employer, or any officer or agent of the employer, who fails to properly classify an individual as an employee in accordance with § 40.1-28.14 for purposes of this title, Title 60.2, and Title 65.2, and fails to pay benefits or other contributions required to be paid with respect to an employee, as determined by this article, shall upon conviction be:

1. If the failure is done knowingly, guilty of a Class 2 misdemeanor for a first offense or a Class 1 misdemeanor for subsequent offenses; or

2. If the failure is done unintentionally, guilty of a Class 3 misdemeanor for a first offense or a Class 2 misdemeanor for subsequent offenses.

§ 40.1-28.16. Debarment; civil penalty; private cause of action.

A. If the Commissioner determines, after notice and hearing, that an employer, or any officer or agent of the employer, has failed to properly classify an individual as an employee in accordance with § 40.1-28.14 and failed to pay required benefits or other contributions or, if a final conviction and disposition of a violation of this article is made pursuant to § 40.1-28.15, the Commissioner shall notify all public bodies, as defined in § 2.2-4301, of the name of the employer, and upon receipt of such notice the public body shall not award a public contract under the Virginia Public Procurement Act (§ 2.2-4300 et seq.) to such employer or to any firm, corporation, or partnership in which the employer has an interest until a period of up to three years, as determined by the Commissioner, has elapsed from the date of the notice.

B. In addition to any other civil remedy or criminal penalty provided for in this article, the

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59 Commissioner, after notice and hearing, may levy a civil penalty of up to \$1,000 per violation on any
60 employer who violates any provision of this article, which civil penalty shall be \$5,000 if violation is the
61 employer's failure to properly classify an individual as an employee. Each civil penalty under this
62 article shall be paid into the general fund of the Commonwealth.

63 C. An individual who has not been properly classified as an employee may bring a civil action for
64 damages against the employer for failing to properly classify the employee if the employer had
65 knowledge of the misclassification. An individual's representative, including a labor organization, may
66 bring the action on behalf of the individual. If the court finds that the employer has violated any of the
67 provisions of this statute, the court may award an individual any damages in the amount of any wages,
68 salary, employment benefits, including expenses incurred by the employee that would otherwise have
69 been covered by insurance, or other compensation lost to the individual, as well as a reasonable
70 attorney's fee and the costs incurred by the employee in bringing the action.

71 § 40.1-28.17. Stop-work orders.

72 A. If the Commissioner determines, after notice and hearing, that an employer failed to properly
73 classify an individual as an employee in accordance with § 40.1-28.14, the Commissioner shall issue a
74 stop-work order requiring the cessation of all business operations within 72 hours of the determination.
75 The order shall take effect when served upon the employer or, for a particular employer work site, when
76 served at that work site. The order shall remain in effect until the Commissioner issues an order
77 releasing the stop-work order upon finding that the employer has properly classified the individual as
78 an employee and has paid any penalty assessed under this article. As a condition of release from a
79 stop-work order, the Commissioner may require an employer who is found to have failed to properly
80 classify an individual as an employee to file with the Department periodic reports for a probationary
81 period that shall not exceed two years that demonstrate the employer's continued compliance with this
82 article. The Department shall adopt regulations establishing filing times and report requirements.

83 B. Stop-work orders and penalty assessment orders issued pursuant to this section against an
84 employer shall be in effect against any successor corporation or business entity that has one or more of
85 the same principals or officers as the employer against whom the stop-work order was issued and which
86 is engaged in the same or equivalent trade or activity.

87 C. The Secretary shall assess a penalty of \$1,000 per day against an employer for each day that it
88 conducts business operations that are in violation of a stop-work order issued pursuant to this section.

89 § 40.1-28.18. Notice of law.

90 A. The Commissioner shall direct the preparation of posters summarizing the requirements of this
91 chapter, which posters shall be in English, Spanish, and any other languages that the Secretary finds
92 appropriate. The English and Spanish and such other versions of the poster as the Secretary finds
93 appropriate shall be posted on the Internet website of the Department of Labor and Industry and on
94 bulletin boards in offices of the Virginia Employment Commission.

95 B. The Department shall provide the posters without charge to employers upon request.

96 C. If an employer is found to have violated this chapter or rules adopted pursuant to this article, the
97 employer shall be required to post the English and Spanish versions and any other version the Secretary
98 finds appropriate in conspicuous locations at the places where notices to employees are normally posted
99 at each job site and office of the employer.

100 § 40.1-28.19. Procedure.

101 A. Actions taken under §§ 40.1-28.16 and 40.1-28.17 are subject to the right of notice and
102 adjudication and the right of appeal in accordance with the provisions of the Administrative Process Act
103 (§ 2.2-4000 et seq.).

104 B. The Department has the power to subpoena witnesses, administer oaths, examine witnesses and
105 take testimony, or compel the production of documents in connection with any investigation or action
106 pursuant to this article. Whenever the Commissioner has reasonable cause to believe that any person
107 has engaged in, or is engaging in, or is about to engage in, any violation of this article, the
108 Commissioner is empowered to issue a civil investigative demand. The provisions of § 59.1-9.10 shall
109 apply mutatis mutandis to civil investigative demands issued pursuant to this section.

110 § 40.1-28.20. Certain agreements prohibited.

111 No person shall require or request that an individual enter into an agreement or sign a document
112 that results in the misclassification of the individual as an independent contractor or otherwise does not
113 accurately reflect the relationship with the employer.

114 § 40.1-28.21. Unlawful acts.

115 It shall be unlawful for an employer or any other party to discriminate in any manner or take
116 adverse action against any person in retaliation for exercising rights protected under this article. Rights
117 protected include, but are not limited to, the right to file a complaint regarding a violation of this
118 article, testifying or otherwise cooperating in an investigation or proceeding under this article,
119 informing any person of their rights under this article or of an employer's noncompliance with this
120 article, or otherwise assisting any person in any fashion in asserting rights under this article. Any

121 *person who in good faith alleges noncompliance with this article shall be afforded the rights provided*
122 *by this section, notwithstanding his failure to prevail on the merits. Taking adverse action against a*
123 *person within 90 days of the person's exercise of rights protected under this article shall raise a*
124 *rebuttable presumption of having done so in retaliation for the exercise of those rights.*
125 *§ 40.1-28.22. Regulations.*
126 *The Commissioner shall adopt regulations to carry out this article.*