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SENATE BILL NO. 377

Offered January 13, 2010

Prefiled January 12, 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 40.1-28.31, relating to the failure to properly classify employees; Workplace Fraud Act.*

Patron—Puckett

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 40.1-28.31, as follows:

*Article 1.2.**Workplace Fraud Act.**§ 40.1-28.13. Definitions.*

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

"Construction services" includes the following services provided in connection with real property: building, reconstructing, improving, enlarging, painting, altering, maintaining, and repairing.

"Employer" means any person that employs an individual in the Commonwealth.

"Exempt person" means an individual who:

1. Performs services in a personal capacity and employs no individuals other than (i) a spouse of the exempt person, (ii) children of the exempt person, or (iii) parents of the exempt person;

2. Performs services free from direction and control over the means and manner of providing the services, subject only to the right of the person or entity for whom services are provided to specify the desired result;

3. Furnishes necessary tools and equipment to a person who performs services, without performing any services himself;

4. Operates a business that is considered inseparable from the individual for purposes of taxes, profits, and liabilities (i) in which the individual (a) owns all of the assets and profits of the business and (b) has sole, unlimited, personal liability for all of the debts and liabilities of the business, unless the business is organized as a sole proprietorship, to which sole, unlimited personal liability does not apply, and (ii) for which (a) the individual does not pay taxes for the business separately but reports business income and losses on the individual's personal tax return and (b) if the business is organized as a corporate entity and the individual otherwise qualifies as an exempt person under this definition, the individual files a separate federal informational tax return for the entity as required by law;

5. Exercises complete control over the management and operations of the business; and

6. Exercises the right and opportunity on a continuing basis to perform the services of the business for multiple entities at the individual's sole choice and discretion.

"Knowingly" means having actual knowledge, deliberate ignorance, or reckless disregard for the truth.

"Place of business" means the office or headquarters of the employer. "Place of business" does not include a work site at which the employer has been contracted to perform services.

"Public body" means the Commonwealth, a unit of state government or an instrumentality of the Commonwealth, or any political subdivision, agency, person, or entity that is a party to a contract for which 50 percent or more of the money used is money appropriated by the Commonwealth.

§ 40.1-28.14. Scope.

This article applies only to construction services.

§ 40.1-28.15. Failure to properly classify employee.

A. An employer shall not fail to properly classify an individual who performs work in construction services for remuneration paid by the employer.

B. An employer has failed to properly classify an individual when an employer-employee relationship exists as determined under subsection C but the employer has not classified the individual as an employee.

C. For purposes of enforcement of this article, work performed in construction services by an individual for remuneration paid by an employer shall be presumed to create an employer-employee relationship, unless (i) the individual is an exempt person or (ii) an employer demonstrates that:

1. The individual who performs the work is free from control and direction over its performance both

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59 in fact and under the contract;

60 2. The individual is engaged customarily in an independent business or occupation of the same
61 nature as that involved in the work; and

62 3. The work is (i) outside of the usual course of business of the person for whom the work is
63 performed or (ii) performed outside of any place of business of the person for whom the work is
64 performed. Work is outside of the usual course of business of the person for whom it is performed under
65 this subsection if:

66 a. The individual performs the work off the employer's premises;

67 b. The individual performs work that is not integrated into the employer's operation; or

68 c. The work performed is unrelated to the employer's business.

69 By contract, an employer may engage another business entity, which may have its own employees, to
70 do the same type of work in which the employer engages, at the same location where the employer is
71 working, without establishing an employer-employee relationship between the two contracting entities.

72 D. The Commissioner shall adopt regulations that provide further explanation and specific examples
73 of the application of subsection C.

74 § 40.1-28.16. Knowing failure to properly classify employee.

75 A. An employer shall not knowingly fail to properly classify an individual who performs work for
76 remuneration paid by the employer.

77 B. An employer has knowingly failed to properly classify an individual when:

78 1. An employer-employee relationship exists as determined under subsection C of § 40.1-28.15; and

79 2. The employer has knowingly failed to properly classify the individual as an employee.

80 C. The Commissioner shall consider, as strong evidence that the employer did not knowingly fail to
81 properly classify an individual, whether:

82 1. Before a complaint was filed against the employer or the Commissioner began an investigation of
83 the employer, the employer:

84 a. Sought and obtained evidence that the individual (i) is an exempt person or (ii) as an independent
85 contractor (a) withholds, reports, and remits payroll taxes on behalf of all individuals working for the
86 independent contractor, (b) pays unemployment insurance taxes for all individuals working for the
87 independent contractor, and (c) maintains workers' compensation insurance; and

88 b. Provided to the exempt person or independent contractor a written notice as required by
89 § 40.1-28.26; or

90 2. The employer:

91 a. Classifies all workers who perform the same or substantially the same tasks for the employer as
92 independent contractors and reports the income of the workers to the Internal Revenue Service as
93 required by federal law; and

94 b. Has received a determination from the Internal Revenue Service that the individual or a worker
95 who performs the same or substantially the same task as the individual is an independent contractor.

96 D. The Commissioner shall adopt regulations to provide guidance as to what constitutes the evidence
97 relevant to the determination of whether an employer knowingly failed to properly classify an employee.

98 § 40.1-28.17. Investigation; penalty.

99 A. The Commissioner shall investigate as necessary to determine compliance with this article and
100 regulations adopted under this article.

101 B. Any written or oral complaint or statement made by a person as part of an investigation under
102 this section is confidential and may not be disclosed without the consent of the person until the
103 investigation is concluded and a citation is issued. Any written or oral statement made by an individual
104 alleged to be employed by the respondent as part of an investigation under this section is confidential
105 and may not be disclosed without the consent of the individual.

106 C. The Commissioner may enter a place of business or work site to:

107 1. Observe work being performed;

108 2. Interview individuals on the work site, including those identified as employees and independent
109 contractors; and

110 3. Review and copy records.

111 D. The Commissioner may require each employer to:

112 1. Identify and produce all records relevant to the classification of each individual;

113 2. Attest to the truthfulness of each record that is copied in accordance with subdivision C 3 and to
114 sign the copy; or

115 3. At the option of the employer, submit a written statement about the classification of each employee
116 on the form provided by the Commissioner, with any relevant records attached.

117 E. An employer that fails to produce records or a written statement under subsection D within 15
118 business days after the Commissioner's request shall be subject to a civil penalty not exceeding \$500
119 per day for each day the records are not produced.

120 F. The Commissioner may issue a subpoena for testimony and the production of records. If a person

fails to comply with a subpoena issued under this subsection, the Commissioner may file a complaint in the circuit court for the city or county where the person resides, is employed, or has a place of business, requesting an order directing compliance with the subpoena.

§ 40.1-28.18. Citation.

A. If, after investigation, the Commissioner determines that an employer has violated this article or a regulation adopted under this article, the Commissioner shall promptly issue a citation to the employer.

B. Each citation shall (i) describe in detail the nature of the alleged violation, (ii) cite the provision of this article or any regulation that the employer is alleged to have violated, and (iii) state the civil penalty, if any, that the Commissioner proposes to assess.

C. Within a reasonable time after issuance of a citation, the Commissioner shall send by certified mail to the employer (i) a copy of the citation and (ii) notice of the opportunity to request a hearing.

D. Within 15 days after an employer receives a notice under subsection C, the employer may submit a written request for a hearing on the citation and proposed penalty.

E. If a hearing is not requested within 15 days, the citation, including any penalties, shall become a final order of the Commissioner.

F. The Commissioner has the burden of proof to show that an employer has knowingly failed to properly classify an individual as an employee.

G. Any party aggrieved by a final order of the Commissioner under this section may seek judicial review and appeal under the Administrative Process Act (§ 2.2-4000 et seq.).

§ 40.1-28.19. Finding of violation and compliance.

A. If, after investigation, the Commissioner determines that an employer failed to properly classify an individual as an employee in violation of § 40.1-28.15 or knowingly failed to properly classify as an employee an employee in violation of § 40.1-28.16, and issues a citation, the Commissioner shall notify the Virginia Employment Commission, the Department of Taxation, and the Workers' Compensation Commission to enable these agencies to assure an employer's compliance with their laws, utilizing their own definitions, standards, and procedures.

B. An employer found in violation of § 40.1-28.15 by a final order of a court or the Commissioner shall be required, within 45 days after the final order, to pay restitution to any individual not properly classified and to otherwise come into compliance with all applicable labor laws, including those related to income tax withholding, unemployment insurance, wage laws, and workers' compensation. The requirement for compliance with applicable labor laws may include requiring the employer to enter into an agreement, within 45 days after the final order, with a governmental unit for payment of any amounts owed by the employer to the unit. The requirement for compliance with applicable labor laws shall not require payments for more than a 12-month period and shall not require payments due for a period before the 12-month period before the citation was issued.

C. An employer found in violation of § 40.1-28.16 by a final order of a court or the Commissioner shall be required, within 45 days after the final order, to pay restitution to any individual not properly classified and to otherwise come into compliance with all applicable labor laws, including those related to income tax withholding, unemployment insurance, wage laws, and workers' compensation.

§ 40.1-28.20. Civil penalty for violation of § 40.1-28.15.

A. An employer in violation of § 40.1-28.15 who comes into timely compliance with all applicable labor laws as required by subsection B of § 40.1-28.19 shall not be assessed a civil penalty.

B. An employer in violation of § 40.1-28.15 who fails to come into timely compliance with all applicable labor laws as required by subsection B of § 40.1-28.19 shall be assessed a civil penalty of up to \$1,000 for each employee for whom the employer is not in compliance. In determining the amount of the penalty, the Commissioner shall consider the factors set forth in subsection B of § 40.1-28.21.

C. An employer may be assessed civil penalties under this section by only one final order of a court or administrative unit for the same actions constituting noncompliance with applicable labor laws as required by subsections B and C of § 40.1-28.19; however, an employer may be ordered to make restitution, pay any interest due, and otherwise comply with all applicable laws and regulations by multiple final orders of a court and Virginia Employment Commission, the Department of Taxation, and the Workers' Compensation Commission.

D. Any penalty issued under this section against an employer shall be in effect against any successor corporation or business entity that:

1. Has one or more of the same principals or officers as the employer against whom the penalty was assessed; and

2. Is engaged in the same or equivalent trade or activity.

§ 40.1-28.21. Civil penalty for violation of § 40.1-28.16.

A. An employer found to have knowingly failed to properly classify an individual in violation of § 40.1-28.16 shall be assessed a civil penalty of up to \$5,000 for each employee who was not properly classified.

B. In determining the amount of the penalty, the Commissioner shall consider:

- 1. The gravity of the violation;*
- 2. The size of the employer's business;*
- 3. The employer's good faith;*
- 4. The employer's history of violations under this article; and*
- 5. Whether the employer has been found to have deprived the employee of any rights to which the employee would have been entitled under the laws of the Commonwealth.*

C. If a court determines that an individual or class of individuals is entitled to restitution as a result of the employer's violation of § 40.1-28.16, the court shall award each individual any restitution to which the individual may be entitled and may award each individual an additional amount up to three times the amount of such restitution.

D. An employer in violation of § 40.1-28.16 may be assessed double the administrative penalties set forth in subsection A if the employer has been found previously to have violated this article by a final order of a court.

E. An employer who has been found by a final order of a court to have violated § 40.1-28.16 three or more times may be assessed an administrative penalty of up to \$20,000 for each employee.

F. An employer may be assessed civil penalties under this section by only one final order of a court or Commissioner for the same actions constituting a violation of this article; however, an employer may be ordered to make restitution, pay any interest due, and otherwise comply with all applicable laws and regulations by orders of a court and all relevant administrative agencies, including the Virginia Employment Commission, the Department of Taxation, and the Workers' Compensation Commission.

G. Any penalty issued under this section against an employer shall be in effect against any successor corporation or business entity that has one or more of the same principals or officers as the employer against whom the penalty was assessed, unless the principal or officer did not or with the exercise of reasonable diligence could not know of the violation for which the penalty was imposed, and is engaged in the same or equivalent trade or activity.

§ 40.1-28.22. Cooperation among various agencies.

As authorized by applicable law, all agencies of the Commonwealth shall cooperate and share information concerning any suspected failure to properly classify an individual as an employee.

§ 40.1-28.23. Civil action.

A. An individual who has not been properly classified as an employee may bring a civil action for economic damages against the employer for any violation of this article. However, an individual may not bring a civil action under this section if a final order of the Commissioner or of a court has been issued under § 40.1-28.18.

B. An action filed under this section shall be filed within three years after the date the cause of action accrues.

C. If the court determines that an individual or class of individuals is entitled to judgment in an action against an employer filed in accordance with this section, the court may award each individual:

- 1. Any damages to which the individual may be entitled under subsection A;*
- 2. An additional amount up to three times the amount of any such damages, if the employer knowingly failed to properly classify the individual;*
- 3. Reasonable attorney fees and other costs of the action; and*
- 4. Any other appropriate relief.*

§ 40.1-28.24. Discriminatory action by employer.

A. An employer shall not discriminate in any manner or take adverse action against an individual because the individual:

- 1. Files a complaint with the employer or the Commissioner alleging that the employer violated any provision of this article or any regulation adopted under this article;*
- 2. Brings an action under this article or a proceeding involving a violation of this article; or*
- 3. Testifies in an action authorized under this article or a proceeding involving a violation of this article.*

B. An individual who believes that an employer has discriminated in any manner or taken adverse action against the individual in violation of subsection A may submit to the Commissioner a written complaint that alleges the discrimination and that includes the signature of the individual. An individual shall file a complaint under this subsection within 180 days after the alleged discrimination occurs.

C. On receipt of a complaint under subsection B, the Commissioner may conduct an investigation. The Commissioner shall provide the employer with an opportunity to respond to the allegations in the complaint. If, after investigation and consideration of any response from the employer, the Commissioner determines that an employer or other person has violated subsection A, the Commissioner shall file a complaint to enjoin the violation, to reinstate the employee to the former position with back pay, and to award any other appropriate damages or other relief in the circuit court for the city or county in which the alleged violation occurred, the city or county in which the employer has its

principal office, or the City of Richmond. Within 120 days after the Commissioner receives a complaint, the Commissioner shall notify the employee of the determination under this subsection.

§ 40.1-28.25. Violation by employer engaged in contract work with public body.

A. Where, after investigation, the Commissioner issues a citation for a violation of this article or regulations adopted under this article by an employer engaged in work on a contract with a public body, the Commissioner shall promptly notify the public body.

B. On notification, the public body shall withhold from payment due the employer an amount that is sufficient to (i) pay restitution to each employee for the full amount of wages due and (ii) pay any benefits, taxes, or other contributions that are required by law to be paid on behalf of the employee. The public body shall release:

1. On issuance of a favorable final order of a court or the Commissioner, the full amount of the withheld funds; and

2. On an adverse final order of a court or the Commissioner, the balance of the withheld funds after all obligations are satisfied under subdivision 1.

§ 40.1-28.26. Records; notice to independent contractor or exempt person.

A. An employer shall keep, for at least three years, in or about its place of business, records of the employer containing the following information:

1. The name, address, occupation, and classification of each employee or independent contractor;

2. The rate of pay of each employee or method of payment for the independent contractor;

3. The amount that is paid each pay period to each employee or, if applicable, independent contractor;

4. The hours that each employee or independent contractor works each day and each work week;

5. For all individuals who are not classified as employees, evidence that each individual is an exempt person or an independent contractor or its employee; and

6. Other information that the Commissioner requires, by regulation, as necessary to enforce this article.

B. An employer shall provide each individual classified as an independent contractor or exempt person with written notice of the classification of the individual at the time the individual is hired.

C. The written notice shall:

1. Include an explanation of the implications of the individual's classification as an independent contractor or exempt person rather than as an employee; and

2. Be provided in English and Spanish.

D. The Commissioner shall adopt regulations establishing the specific requirements for the contents and form of the notice.

§ 40.1-28.27. Prohibited activities.

A. A person shall not knowingly incorporate or form, or assist in the incorporation or formation of, a corporation, partnership, limited liability corporation, or other entity or pay or collect a fee for use of a foreign or domestic corporation, partnership, limited liability corporation, or other entity for the purpose of facilitating, or evading detection of, a violation of this article.

B. A person shall not knowingly conspire with, aid and abet, assist, advise, or facilitate an employer with the intent of violating this article.

C. Except as provided in subsection F, a person that violates this section shall be subject to a civil penalty not exceeding \$20,000. If the person is exempt from sanction under subsection F, the Commissioner shall promptly refer the person for investigation and possible sanction to the unit of state government that has regulatory jurisdiction over the business activities of that person.

D. The procedures governing investigations, citations, and administrative and judicial review of an alleged violation under this section shall be the same as those set forth in §§ 40.1-28.17 and 40.1-28.18.

E. A person may be assessed civil penalties under this section by only one final order of a court or governmental agency for the same actions constituting the violation.

F. A person that violates this section may not be subject to a civil penalty under this section if the person (i) holds a professional license as a lawyer or a certified public accountant and (ii) was performing an activity in the ordinary course of that person's license when the violation occurred.

§ 40.1-28.28. Groundless or malicious complaint and bad faith actions; administrative penalty; attorney fees.

A. A person shall not:

1. Make or cause to be made a groundless or malicious complaint to the Commissioner or an authorized representative of the Commissioner;

2. In bad faith, bring an action under this article or a proceeding related to the subject of this article; or

3. In bad faith, testify in an action under this article or a proceeding related to the subject of this article.

305 *B. The Commissioner shall investigate any allegations that a person has violated any provision of*
306 *this section.*

307 *C. If the Commissioner determines that a person has violated any provision of this section, that*
308 *person may be subject to an administrative penalty of up to \$1,000, assessed by the Commissioner. A*
309 *sanction under this subsection shall be subject to the notice and hearing requirements of § 40.1-28.18. If*
310 *the person found in violation of this section is a person alleged to be employed by the respondent, the*
311 *Commissioner shall disclose the identity of the complainant.*

312 *D. Any person who is required to defend an action taken as a result of a groundless or malicious*
313 *complaint shall be entitled to recover attorney fees.*

314 *§ 40.1-28.29. Regulations.*

315 *The Commissioner shall adopt regulations to carry out this article.*

316 *§ 40.1-28.30. Disposition of civil penalties.*

317 *Each civil penalty under this article shall be paid into the general fund of the Commonwealth.*

318 *§ 40.1-28.31. Annual report.*

319 *The Commissioner shall prepare an annual report for the Governor on the administration and*
320 *enforcement of this article. The report shall include:*

321 1. *The number and nature of complaints received;*

322 2. *The number of investigations conducted;*

323 3. *The number of citations issued;*

324 4. *The number of informal resolutions of the citations;*

325 5. *The number of final administrative orders, with a description that shall include (i) whether the*
326 *alleged violation was found and (ii) whether the order affirmed or overturned a proposed decision of a*
327 *hearing officer; and*

328 6. *The number of requests for judicial review of administrative orders and whether the orders were*
329 *affirmed or overturned.*