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HOUSE BILL NO. 801

Offered January 8, 2020

Prefiled January 7, 2020

A *BILL to amend the Code of Virginia by adding in Title 40.1 a chapter numbered 5.1, consisting of sections numbered 40.1-116.1 through 40.1-116.11, relating to the classification of employees; penalties.*

Patrons—Delaney, Hope, Jenkins, Levine, Rasoul and Samirah; Senator: Howell

Referred to Committee on Labor and Commerce

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Title 40.1 a chapter numbered 5.1, consisting of sections numbered 40.1-116.1 through 40.1-116.11, as follows:

CHAPTER 5.1.**EMPLOYEE CLASSIFICATION.****§ 40.1-116.1. Definitions.**

As used in this chapter, unless the context requires a different meaning:

"Construction" means the construction, alteration, repairing, dismantling, or demolition of buildings, roads, and every other type of structure, project, development, or improvement on real property, including new work, additions, alterations, reconstruction, installations, and repairs performed at one or more different sites that may be dispersed geographically.

"Contractor" means a person (i) providing a delivery service or (ii) engaged in the business of construction. "Contractor" includes any subcontractor engaged in the business of such activities and any person who is providing or arranging for labor for such activities, either as an employee or as an independent contractor, for any contractor or person.

"Delivery service" means the transport and delivery of goods, products, supplies, or raw materials upon the highways of the Commonwealth.

"Performing services" means performing, for remuneration, delivery services or construction labor services.

§ 40.1-116.2. Presumption; how construed.

A. An individual performing construction labor services for a contractor is presumed an employee of the contractor and not an independent contractor for purposes of this chapter, unless:

1. It is shown to the satisfaction of the Commissioner that (i) such individual has been and will continue to be free from control or direction over the performance of the services performed by the individual for wages, both under his contract of service and in fact; (ii) such services are either outside the usual course of the business for which such services are performed or such services are performed outside of all the places of business of the enterprise for which such services are performed; and (iii) such individual is customarily engaged in an independently established trade, occupation, profession, or business;

2. The individual, during the time he performed construction work for the contractor, maintained a workplace that is subject to inspection by the Commissioner pursuant to the occupational safety and health laws of the Commonwealth and any such rules, regulations, or standards adopted in pursuance of such laws; and

3. The individual has been assigned an experience rating tax rate pursuant to § 60.2-531.

B. An individual performing delivery services for a contractor is presumed an employee and not an independent contractor for purposes of this chapter unless it is shown to the satisfaction of the Commissioner that (i) such individual has been and will continue to be free from control or direction over the performance of the services performed by the individual for wages, both under his contract of service and in fact; (ii) such services are either outside the usual course of the business for which such services are performed or such services are performed outside of all the places of business of the enterprise for which such services are performed; and (iii) such individual is customarily engaged in an independently established trade, occupation, profession, or business.

C. This chapter shall not be construed to:

1. Affect or apply to common law or statutory action providing for recovery in tort;

2. Affect or change the common-law interpretation of independent contractor status as it relates to tort liability or a claim under Title 65.2;

3. Affect or alter the use of the term "independent contractor" as interpreted by the Department of Taxation; or

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4. Affect any action brought pursuant to Title 58.1.

§ 40.1-116.3. Misclassification prohibited.

A contractor shall not designate an individual as an independent contractor who would be properly classified as an employee under subsection A or B of § 40.1-116.2.

§ 40.1-116.4. Reports of suspected violations; duties of Department; confidentiality.

The Department shall establish and operate a hotline and web site for individuals to report suspected violations of this chapter. At a minimum, the Department shall require the reporting individual to provide contact information and a description of the suspected violation including the name of the business and job site location. Except to the extent needed in any administrative hearing, civil action, or criminal proceeding brought to enforce the provisions of Title 58.1, Title 60.2, or Title 65.2, information obtained by the Department under this section or obtained from any individual pursuant to the administration of this chapter shall be held confidential.

§ 40.1-116.5. Investigations.

The Department shall timely investigate all credible reports made pursuant to § 40.1-116.4.

§ 40.1-116.6. Civil penalties; debarment for nonpayment.

A. In addition to any other civil fines or criminal penalties provided by law, if the Commissioner determines, after notice and hearing, that an employer has violated any provision of this chapter, the Commissioner may levy a civil penalty of up to \$500 per each misclassified individual for the first offense and a civil penalty of up to \$5,000 per each misclassified individual for each second and subsequent offense. Each civil penalty under this article shall be paid into the general fund of the Commonwealth.

B. If a contractor has been assessed a civil penalty under subsection A and has not paid such civil penalty in accordance with this chapter, then he Commissioner shall notify all public bodies, as defined in § 2.2-4301, of the name of the contractor, 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 contractor or to any firm, corporation, or partnership in which the contractor has an interest until a period of up to three years, as determined by the Commissioner, has elapsed from the date of the notice.

§ 40.1-116.7. Action to collect unpaid combined taxes plus interest; additional investigation and enforcement action.

A. Upon finding that a contractor has violated this chapter, the Commissioner shall:

1. Notify the Virginia Employment Commission with a request that the agency instigate proceedings pursuant to Title 60.2 to collect any unpaid combined taxes plus interest;

2. Notify the Department of Taxation with a request that the agency instigate proceedings pursuant to Title 58.1 to collect any unpaid combined taxes plus interest; and

3. Notify the Workers' Compensation Commission with a request that the agency instigate proceedings pursuant to Title 65.2 to take any appropriate action.

B. Upon receipt of a request under subsection A, the Virginia Employment Commission, Department of Taxation, and Workers' Compensation Commission shall promptly investigate and, if appropriate, proceed with the collection of any sums due under Title 58.1, Title 60.2, or Title 65.2, respectively.

C. The Commissioner, Virginia Employment Commission, Department of Taxation, and Workers' Compensation Commission shall refer any violation reasonably believed to be a civil or criminal violation of any provision of this chapter, Title 58.1, Title 60.2, Title 65.2, or other law to the appropriate prosecuting authority for appropriate action.

§ 40.1-116.8. Report; contents.

The Department shall provide an annual report to the Governor and the General Assembly regarding compliance with and enforcement of this chapter. The report shall include information regarding the number of reports received from both its hotline and website; the number of investigated reports; the findings of the reports; the amount of combined tax, interest, and fines collected; the number of referrals to the Department of Taxation, Workers' Compensation Commission, Virginia Employment Commission, and appropriate agency or entity, and the outcome of such referrals.

§ 40.1-116.9. Contractors to post notice.

Every contractor shall post in a conspicuous place at the job site or place of business in English and Spanish a notice, in form approved by the Department, that states in substance the following:

"Every individual working for a contractor has the right to be properly classified by the contractor as an employee rather than an independent contractor if the individual does not meet the requirements of an independent contractor under Chapter 5.1 (§ 40.1-116.1 et seq.) of Title 40.1 of the Code of Virginia. If you believe you or someone else has not been properly classified as an employee or an independent contractor under this chapter, contact the Department of Labor and Industry."

§ 40.1-116.10. Requirements for certain public contracts; affidavit required; rescission.

Any contract between any agency of the Commonwealth or any political subdivision thereof and a contractor shall require that each contractor who performs construction or delivery services pursuant to the contract submit to the Commonwealth or political subdivision an affidavit attesting that (i) each

individual performing services for such contractor is properly classified under this chapter and (ii) as of the time of the contract, such contractor is not barred from contracting with the Commonwealth or any political subdivision pursuant to § 40.1-116.6 or 40.1-116.11. Such contract shall also require that the contractor comply with the provisions of this chapter. A violation of the act by a contractor is grounds for rescission of the contract by the Commonwealth or political subdivision.

§ 40.1-116.11. Contractor; false affidavit as perjury; penalty; debarment.

Any contractor who knowingly provides a false affidavit under § 40.1-116.10 to an agency of the Commonwealth or any political subdivision thereof is guilty of perjury and punishable as provided in § 18.2-434. Upon a second or subsequent conviction thereof, the Commissioner shall notify all public bodies, as defined in § 2.2-4301, of the name of the contractor, 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 contractor or to any firm, corporation, or partnership in which the contractor has an interest until a period of up to three years has elapsed from the date of discovery of the falsehood.

2. That the provisions of this act may result in a net increase in periods of imprisonment or commitment. Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the necessary appropriation cannot be determined for periods of imprisonment in state adult correctional facilities; therefore, Chapter 854 of the Acts of Assembly of 2019 requires the Virginia Criminal Sentencing Commission to assign a minimum fiscal impact of \$50,000. Pursuant to § 30-19.1:4 of the Code of Virginia, the estimated amount of the necessary appropriation cannot be determined for periods of commitment to the custody of the Department of Juvenile Justice.