

CHAPTER 114

AN ACT concerning the classification of construction employees for certain purposes and supplementing Title 34 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

C.34:20-1 Short title.

1. This act shall be known and may be cited as the “Construction Industry Independent Contractor Act.”

C.34:20-2 Findings, declarations relative to classification of construction employees.

2. The Legislature finds that employers in the construction industry who improperly classify employees as independent contractors deprive these workers of proper Social Security benefits and other benefits, while reducing the employers’ State and federal tax withholdings and related obligations. Moreover, this practice puts businesses that bear higher costs for complying with the law at a competitive disadvantage.

C.34:20-3 Definitions relative to classification of construction employees.

3. For purposes of this act:

“Employer” means a partnership, association, joint stock company, trust, corporation, or other legal business entity or successor thereof who is primarily engaged in the business of, or enters into a contract for, making improvements to real property and includes any subcontractor or lower tier contractor.

“Public body” means the State of New Jersey, any of its political subdivisions, any authority created by the Legislature of the State of New Jersey and any instrumentality or agency of the State of New Jersey or of any of its political subdivisions.

“Public work” means construction, reconstruction, demolition, alteration, custom fabrication, or repair work, or maintenance work, including painting and decorating, done under contract and paid for in whole or in part out of the funds of a public body, except work performed under a rehabilitation program. “Public work” shall also mean construction, reconstruction, demolition, alteration, custom fabrication, or repair work, done on any property or premises, whether or not the work is paid for from public funds, if, at the time of the entering into of the contract:

(a) Not less than 55% of the property or premises is leased by a public body, or is subject to an agreement to be subsequently leased by the public body; and

(b) The portion of the property or premises that is leased or subject to an agreement to be subsequently leased by the public body measures more than 20,000 square feet.

C.34:20-4 Certain services deemed employment; exceptions.

4. For purposes of the “New Jersey Prevailing Wage Act,” P.L.1963, c.150 (C.34:11-56.25 et seq.), the “unemployment compensation law,” R.S.43:21-1 et seq., the “Temporary Disability Benefits Law,” P.L.1948, c.110 (C.43:21-25 et seq.), the “New Jersey Gross Income Tax Act,” N.J.S.54A:1-1 et seq., or other applicable State tax laws, P.L.1965, c.173 (C.34:11-4.1 et seq.) and the “New Jersey State Wage and Hour Law,” P.L.1966, c.113 (C.34:11-56a et seq.), services performed in the making of improvements to real property by an individual for remuneration paid by an employer shall be deemed to be employment unless and until it is shown to the satisfaction of the Department of Labor and Workforce Development that:

a. the individual has been and will continue to be free from control or direction over the performance of that service, both under his contract of service and in fact; and

b. the service is either outside the usual course of the business for which the service is performed, or the service is performed outside of all the places of business of the employer for which the service is performed; and

c. the individual is customarily engaged in an independently established trade, occupation, profession or business.

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 section.

C.34:20-5 Improper classification of construction employees, degree of offense, crime; penalties.

5. a. An employer, or any officer, agent, superintendent, foreman, or employee of the employer who fails to properly classify an individual as an employee in accordance with section 4 of this act, for purposes of the "New Jersey Prevailing Wage Act," P.L.1963, c.150 (C.34:11-56.25 et seq.), the "unemployment compensation law," R.S.43:21-1 et seq., the "Temporary Disability Benefits Law," P.L.1948, c.110 (C.43:21-25 et seq.), the "New Jersey Gross Income Tax Act," N.J.S.54A:1-1 et seq., P.L.1965, c.173 (C.34:11-4.1 et seq.) or other applicable State tax laws, and the "New Jersey State Wage and Hour Law," P.L.1966, c.113 (C.34:11-56a et seq.), and fails to pay wages, benefits, taxes or other contributions required by any of those acts, shall be:

(1) Guilty of a disorderly persons offense and shall, upon conviction, be fined not less than \$100 nor more than \$1,000 or be imprisoned for not less than 10 nor more than 90 days, or both. Each week, in any day of which an employee is misclassified and each employee so misclassified, shall constitute a separate offense.

(2) If the failure is done knowingly, guilty of a crime of the second degree if the contract amount is for \$75,000 or above; guilty of a crime of the third degree if the contract amount exceeds \$2,500, but is less than \$75,000; and guilty of a crime of the fourth degree if the contract amount is for \$2,500 or less. In addition, the violator shall be deemed to have caused loss to the employees in any amount by which the employees were underpaid in connection with the misclassification and shall be subject to the provisions of N.J.S.2C:43-3 regarding fines and restitution to victims and be subject to other pertinent provisions of Title 2C of the New Jersey Statutes, including, but not limited to, N.J.S.2C:43-4, 2C:43-6 and 2C:44-1.

b. As an alternative to or in addition to any other sanctions provided by law for violations of any provision of this act, when the Commissioner of Labor and Workforce Development finds that an employer has violated this act, the commissioner is authorized to assess and collect administrative penalties, up to a maximum of \$2,500 for a first violation and up to a maximum of \$5,000 for each subsequent violation, specified in a schedule of penalties to be promulgated by regulation by the commissioner in accordance with the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.). When determining the amount of the penalty imposed because of a violation, the commissioner shall consider factors which include the history of previous violations by the employer, the seriousness of the violation, the good faith of the employer and the size of the employer's business. No administrative penalty shall be levied pursuant to this section unless the Commissioner of Labor and Workforce Development provides the alleged violator with notification of the violation and of the amount of the penalty by certified mail and an opportunity to request a

hearing before the commissioner or his designee within 15 days following the receipt of the notice. If a hearing is requested, the commissioner shall issue a final order upon that hearing and a finding that a violation has occurred. If no hearing is requested, the notice shall become a final order upon expiration of the 15-day period. Payment of the penalty is due when a final order is issued or when the notice becomes a final order. Any penalty imposed pursuant to this section may be recovered with costs in a summary proceeding commenced by the commissioner pursuant to the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

c. Any sum collected as a penalty pursuant to this section shall be applied toward enforcement and administration costs of the Division of Workplace Standards in the Department of Labor and Workforce Development.

d. When the Commissioner of Labor and Workforce Development finds that the employer has violated provisions of this act, the commissioner may refer the matter to the Attorney General or his designee for investigation and prosecution. Nothing in this subsection shall be deemed to limit the authority of the Attorney General to investigate and prosecute violations of the New Jersey Code of Criminal Justice, nor to limit the commissioner's ability to refer any matter for criminal investigation or prosecution.

e. A complaint or indictment under the provisions of subsection a. or subsection d. of this section may be brought in Superior Court in accordance with the Rules of Court of the State of New Jersey.

C.34:20-6 Penalty for knowingly improperly classifying construction employee; debarment.

6. If the Commissioner of Labor and Workforce Development determines, after investigation, that an employer or any officer, agent, superintendent, foreman, or employee of the employer has knowingly failed to properly classify an individual as an employee in accordance with section 4 of this act and failed to pay required wages, benefits, taxes or other contributions, or if a final conviction and disposition of a violation of this act is made pursuant to section 5 of this act in which the violator is found to be guilty of a crime of the second, third or fourth degree, then the commissioner shall place the employer on a list of employers who are prohibited from contracting, directly or indirectly, with any public body for the construction of any public building or other public work projects, or from performing any work on the same, for a period of three years. The commissioner shall give notice by mail of that list to any public body who shall request the commissioner so to do.

In the case of a determination by the commissioner, if the person responsible denies that a failure to properly classify an employee has occurred, he shall have the right to apply to the commissioner for a hearing in accordance with the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), which shall be afforded and a decision shall be rendered within 48 hours of the request for a hearing. The commissioner may bring an action in Superior Court to enjoin or invalidate any contract award made in violation of this section.

C.34:20-7 Suspension of contractor's registration; notification, hearing, appeal; stop-work order, civil penalty for continued violation.

7. a. If the Commissioner of Labor and Workforce Development determines, after investigation, that an employer failed to properly classify an individual as an employee in accordance with section 4 of this act, the commissioner may order the immediate suspension of a contractor's registration issued pursuant to section 7 of P.L.1999, c.238 (C.34:11-56.54), if the commissioner also determines that ordering an immediate suspension is in the public

interest, and provided that the contractor is afforded an opportunity to contest the immediate suspension in the following manner:

(1) The commissioner shall notify the contractor in writing of the immediate revocation and the contractor's rights under this subsection.

(2) The contractor may notify the commissioner of its request for an opportunity to be heard and contest the immediate suspension in writing within 72 hours of its receipt of immediate suspension notification.

(3) Within seven business days of receipt of the notification from the contractor pursuant to paragraph (2) of this subsection, the commissioner shall grant the contractor a hearing to contest the immediate suspension. The commissioner shall permit the contractor to present evidence at the hearing.

(4) The commissioner shall issue a written decision within five business days of the hearing either upholding or reversing the contractor's immediate suspension. The decision shall include the grounds for upholding or reversing the contractor's immediate suspension.

(5) If the contractor disagrees with the written decision, the contractor may appeal the decision to the commissioner, in accordance with the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.).

b. If the commissioner orders the immediate suspension of a contractor's registration pursuant to subsection a. of this section, the violation shall have no effect on the registration of any contractor or subcontractor, regardless of tier, in the contractual chain with the suspended contractor.

c. For a second violation of the provisions of this act, the commissioner shall issue a stop-work order requiring the cessation of all business operations at every site at which the violation occurred within 72 hours of that determination. The order shall take effect when served upon the employer, or, for a particular employer worksite, when served at that worksite. The order shall remain in effect until the commissioner issues an order releasing the stop-work order upon finding that the employer has properly classified the individual as an employee and has paid any penalty assessed under this section. As a condition of release from a stop-work order, the commissioner may require an employer who is found to have failed to properly classify an individual as an employee to file with the department periodic reports for a probationary period that shall not exceed two years that demonstrate the employer's continued compliance with this section. The department shall promulgate rules and regulations to determine filing times and report requirements.

d. For a third or any subsequent violation of the provisions of this act, the commissioner shall issue a stop-work order requiring the cessation of all business operations of the violator within 72 hours of that determination. The order shall take effect when served upon the employer. The order shall remain in effect until the commissioner issues an order releasing the stop-work order upon finding that the employer has properly classified the individual as an employee and has paid any penalty assessed under this section. As a condition of release from a stop-work order, the commissioner may require an employer who is found to have failed to properly classify an individual as an employee, to file with the department periodic reports for a probationary period that shall not exceed two years that demonstrate the employer's continued compliance with this section. The department shall promulgate rules and regulations to determine filing times and report requirements.

e. Stop-work orders and penalty assessment orders issued pursuant to 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 stop-work order was issued and which is engaged in the same or equivalent trade or activity.

f. The commissioner may assess a civil penalty of \$5,000 per day against an employer for each day that it conducts business operations that are in violation of a stop-work order issued pursuant to this section.

g. In addition to any other penalties provided for in this section, the commissioner may assess against an employer a civil penalty of \$5,000 for each individual who the employer failed to properly classify as an employee.

h. If the employer denies that a failure to properly classify an employee has occurred, the employer shall have the right to apply to the commissioner to request a hearing, which shall be afforded and a decision rendered within 48 hours of the request for the hearing.

i. The penalty shall be collected by the commissioner in a summary proceeding in accordance with the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

C.34:20-8 Improper classification of construction worker, civil action by employee.

8. a. No employer shall require or request that any individual enter into an agreement or sign a document which results in the misclassification of the individual as an independent contractor or otherwise does not accurately reflect the employment relationship with the employer.

b. An individual employed as a construction worker who has not been properly classified as an employee may bring a civil action for damages against the employer or any other employer who was in contract with the employee, for failing to properly classify the employee if the employer had knowledge of the misclassification. An individual representative, including a labor organization, may bring the action on behalf of the individual or as a class action. The court may award attorneys fees and other costs of the action in addition to damages to an individual or class of individuals who have not been properly classified as employees in accordance with section 4 of this act.

C.34:20-9 Discrimination, retaliation prohibited.

9. It shall be unlawful for an employer or any other party to discriminate in any manner or take adverse action against any person in retaliation for exercising rights protected under this act. Rights protected under this act include, but are not limited to: the right to file a complaint or inform any person about an employer's noncompliance with this act; the right to inform any person of his potential rights and to assist him in asserting those rights. Any person who in good faith alleges noncompliance with this act shall be afforded the rights provided by this act, notwithstanding his failure on the merits. Taking adverse action against a person within 90 days of the person's exercise of rights protected under this act shall raise a rebuttable presumption of having done so in retaliation for the exercise of those rights.

C.34:20-10 Severability.

10. The provisions of this act shall be deemed to be severable and if any section, subsection, paragraph, sentence or other part of this act is declared to be unconstitutional, or the applicability thereof to any person is held invalid, the remainder of this act shall not thereby be deemed to be unconstitutional or invalid.

C.34:20-11 Rules, regulations.

11. The commissioner shall, pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), make and promulgate rules and regulations necessary to implement the purposes of this act.

12. This act shall take effect immediately.

Approved July 13, 2007.