



# HOUSE BILL 482: Employee Misclassification Reform

2015-2016 General Assembly

<b>Committee:</b>	Rules and Operations of the Senate	<b>Date:</b>	September 15, 2015
<b>Introduced by:</b>	Reps. Pendleton, Blust, Szoka, Bishop	<b>Prepared by:</b>	Brad Krehely
<b>Analysis of:</b>	PCS to Fourth Edition H482-CSRN-44		Committee Counsel

**SUMMARY:** *House Bill 482 would enact the Employee Fair Classification Act (Act) to prevent the misclassification of employees as independent contractors and make other reforms regarding employee misclassification. The Proposed Committee Substitute (PCS) does all of the following: (1) provides that the advisory council must meet at least quarterly, (2) clarifies that the independent contractor test includes the eight factors from Hayes v. Board of Trustees of Elon College, (3) provides that employers may appeal determinations of employee misclassification to the Industrial Commission, (4) provides that the Industrial Commission must adopt temporary and permanent rules and establish fees to carry out its duties under the Act, (5) provides that the definition of "employment" includes service involving delivery or distribution of newspapers or shopping news or involving the sale of newspapers or magazines, (6) deletes the provision providing that it is a rebuttable presumption that the term "employee" does not include any person performing newspaper or magazine sales under an arrangement where the newspapers or magazines are sold to the ultimate consumers at a fixed price and the person's compensation is based on the retention of the excess of the fixed price over the amount at which the newspapers or magazines are charged to the person, (7) deletes the appropriation from the bill, and (8) makes technical and conforming changes.*

## BILL ANALYSIS:

### PART I. EMPLOYEE FAIR CLASSIFICATION ACT

**Section 1** would create a new Article in Chapter 143 of the General Statutes entitled the "Employee Fair Classification Act" (Act).

Employee Classification Division: The PCS would establish the Employee Classification Division (Division) in the Department of Revenue to carry out the purposes of the Act. The Secretary of Revenue would appoint the Director of the Division. The Division would have the following duties:

- Be available to receive reports of employee misclassification by telephonic, written, or electronic communication.
- Investigate reports of employee misclassification and assist all relevant State agencies in recovering any back taxes, wages, benefits, penalties, or other monies as a result of employee misclassification.
- Assess administrative civil penalties for instances of employee misclassification.
- Coordinate with relevant State agencies and District Attorneys' offices in the prosecution of employers and individuals who fail to pay civil assessments or penalties assessed as a result of the employer or individual's involvement in employee misclassification.

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# House Bill 482

Page 2

- Provide all relevant information pertaining to each instance of reported employee misclassification to the North Carolina Department of Labor, the North Carolina Department of Revenue, the North Carolina Division of Employment Security, and the North Carolina Industrial Commission to facilitate investigation of potential statutory violations.
- Create a publicly available notice that includes the definition of employee misclassification and indicates the civil penalties.
- Develop methods and strategies for information sharing between State agencies in order to proactively identify possible instances of employee misclassification.
- Develop methods and strategies to educate employers, employees, and the public about proper classification of employees and the prevention of employee misclassification.

Informal Advisory Council: The Director must appoint an informal advisory council to assist with matters within the jurisdiction of the Division. The advisory council must meet at least quarterly and includes the following members:

- The following officers or their designee: Commissioner of Labor; Secretary of Revenue; Chairman of the Industrial Commission; the Assistant Secretary of Commerce for the Division of Employment Security, and the State Budget Director.
- A representative of workers in this State.
- A representative of employers in this State.

Reporting: The Division would issue annually on October 1 to the Joint Legislative Commission on Governmental Operations a report on the administration of the Article and any recommendations of the Division. The report would include: the number of reports of employee misclassification received; the number and amount of back taxes, wages, benefits, penalties, or other monies assessed; the amount of back taxes, wages, benefits, penalties, or other monies collected; and the number of cases referred to each State agency.

Determination of Independent Contractor Status: This provision is intended to codify the holding in *Hayes v. Board of Trustees of Elon College*. Any factors consistent with the holding, including the following factors, would be considered when determining whether an individual is an independent contractor:

- Whether the individual is engaged in an independent business, calling, or occupation.
- Whether the individual is to have the independent use of his or her special skill, knowledge, or training in the execution of the work.
- Whether the individual is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis.
- Whether the individual is not subject to discharge because he or she adopts one method of doing the work rather than another.
- Whether the individual is not in the regular employ of the other contracting party.
- Whether the individual is free to use such assistants as he or she may think proper.
- Whether the individual has full control over such assistants.
- Whether the individual selects his or her own time.

# House Bill 482

Page 3

Acts taken to comply with laws or regulations shall not be considered as evidence contrary to an independent contractor determination.

Prohibition on Employee Misclassification and Civil Penalties: The PCS would prohibit employee misclassification. It is a violation for an employer to willfully or recklessly engage in employee misclassification. The term “willfully engage in employee misclassification” means to knowingly commit employee misclassification (avoiding tax liabilities and other obligations imposed by Chapter 95, Chapter 96, Chapter 97, or Chapter 105 of the General Statutes by misclassifying an employee as an independent contractor) where there is no good faith argument that an individual was an independent contractor.

If an employer is found by the Division to have willfully violated the Article and has been assessed back taxes, wages, benefits, penalties, or other monies by any State agency as a result of misclassifying one or more employees within the previous three calendar years, then subsequent violations as determined by the Division may result in civil penalties up to \$1,000 per misclassified employee. The Division considers the degree of willfulness or recklessness in determining the penalty.

An employer may appeal from a final finding of and penalty imposed by the Division within 60 days of receiving written notice by filing an appeal with the Industrial Commission. The employer has the right to appeal the decision of the Industrial Commission to the NC Court of Appeals within 30 days of receipt of the Industrial Commission's decision.

Temporary Amnesty Program: The Division would establish and administer a temporary amnesty program to encourage voluntary self-reporting by employers currently engaging in employee misclassification. Employers participating in this program would be immune from civil penalties for past instances of employee misclassification that are voluntarily self-reported.

The Division would establish procedures for participation in the temporary amnesty program. These procedures would require, at minimum, the employer file an application with the Division before October 1, 2016 and comply with all determinations and directives issued by the Division pursuant to this Act.

Nothing in this section would be construed to limit the liability of an employer in a civil or criminal matter not provided for by this Act.

Notice and Certification Requirement by Occupational Licensing Boards and Commissions: Every State occupational licensing board or commission would be required to include on every application for licensure, permit, or certification, a certification that the applicant has read and understands the employee misclassification notice provided by the Division. Every applicant for a license, permit, or certification shall certify that he or she has read and understands the misclassification notice. An occupational licensing board or commission would be required to deny the license, permit, or certification of any applicant who fails to comply with the certification requirement.

Confidentiality: The records of the Division would not be public records. This does not apply to civil penalty assessments or final orders relating to an appeal of a civil penalty assessment, or other enforcement actions taken by the Division. The Division may share records with State and federal agencies as permitted or required by law.

Taxicab Drivers: Section 1.2 would repeal G.S. 97-5.1, which creates a rebuttable presumption that taxicab drivers are independent contractors under the Workers' Compensation Act.

Rulemaking: The Division and the Industrial Commission must adopt rules and to carry out their authority under the Act.

# House Bill 482

Page 4

Effective Date: The statutory provisions which establish the Division and which deal with confidentiality are effective when the PCS becomes law. The remainder of this section becomes effective January 1, 2016, and applies to instances of employee misclassification occurring on or after that date.

## **PART II. MISCLASSIFICATION NOTICE ADDED TO NCDOL POSTERS**

**Section 2** would require the Department of Labor to include on the required poster summarizing the Wage and Hour Act in covered businesses, a notice indicating the following:

- Any worker who is defined as an employee under the law shall be treated as an employee unless the individual is an independent contractor.
- Any employee who believes that he or she has been misclassified may report to the Division.
- The physical location, mailing address, telephone number, and email address where alleged incidents of misclassification occurred may be reported to the Division.

## **PART III. SANCTIONS AND OTHER REQUIREMENTS**

**Section 3.1** would authorize the State Licensing Board for General Contractors to refuse to issue or renew or revoke, suspend, or restrict a license or take disciplinary action if a civil penalty was imposed on a licensed general contractor pursuant to a violation of the Act and has been upheld upon final adjudication. This section would also direct the Board to adopt and publish guidelines referencing the prohibition on employee misclassification and providing that a violation of that prohibition is grounds for revocation of a license.

**Section 3.1A** would make an identical change to the law governing the disciplinary authority of the State Licensing Board for Plumbing, Heating, and Fire Sprinkler Contractors. The Board would also be authorized to conduct audits of the pay and project records of licensees in furtherance of the Act.

**Section 3.1B** would authorize the State Board of Examiners of Electrical Contractors, to conduct audits in furtherance of the Act.

**Section 3.1C** makes engaging in employee misclassification by an electrical contractor a prohibited activity under the Act.

**Section 3.2** would make a vendor ineligible to enter into a contract with an agency of the State government if, within five years of the bid solicitation, the vendor has been assessed a civil penalty for a violation of the Act that has been upheld upon final adjudication.

**Section 3.3 and 3.4** would require applicants subject to regulation and licensure by a county or city to certify to the county or city that they have read and understand the employee misclassification notice provided by the Division.

**Section 3.5 and 3.6** would require owners of sites with work in progress subject to local inspection by the county or city to certify to the county or city that they have read and understand the employee misclassification notice provided by the Division.

## **PART IV. UNEMPLOYMENT INSURANCE AND WORKERS' COMPENSATION FOR NEWSPRINT EMPLOYEES**

**Section 4.1** would amend the definition of employment in Chapter 96, Employment Security, to add service involving delivery or distribution of newspapers or shopping news or involving the sale of newspapers or magazines.

# House Bill 482

*Page 5*

**Section 4.2** would delete a provision from the Workers' Compensation Act that creates a rebuttable presumption that the term "employee" does not include any person performing newspaper or magazine sales under an arrangement where the newspapers or magazines are sold to the ultimate consumers at a fixed price and the person's compensation is based on the retention of the excess of the fixed price over the amount at which the newspapers or magazines are charged to the person.

**Section 4.3** provides that Sections 4.1 and 4.2 are effective when the act becomes law.

**EFFECTIVE DATE:** Except as otherwise provided, the PCS becomes effective January 1, 2016.

Karen Cochrane-Brown and Layla Cummings, Staff Attorneys with the Research Division, contributed substantially to this summary.