



This Bill Analysis reflects the contents of the bill as it was presented in committee.

SENATE BILL 694: Employee Misclassification Reform

2015-2016 General Assembly

Committee:	Senate Floor	Date:	April 28, 2015
Introduced by:	Sens. Newton, Lee, Daniel	Prepared by:	Layla Cummings Staff Attorney
Analysis of:	Second Edition		

SUMMARY: *Senate Bill 694 would enact the Employee Fair Classification Act to prevent the misclassification of employees as independent contractors and make other reforms regarding employee misclassification.*

The Proposed Committee Substitute (PCS) revises the name of the new Division created, expands the factors for determining whether an individual is an independent contractor, and makes other conforming and clarifying 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 bill would establish the Employee Classification Division (Division) in the Office of State Budget and Management to carry out the purposes of the Act. The State Budget Director 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.
- Refer contested penalty assessments to the Office of Administrative Hearings.
- 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.
- 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.

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- 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.
- Establish training modules and materials pertaining to the investigation and enforcement of incidents of employee misclassification for use by State agency investigators and law enforcement agencies.

Informal Advisory Council: The Director would be directed to appoint an informal advisory council to advise on matters within the jurisdiction of the Division to include the following members:

- The following officers or their designee: Commissioner of Labor; Secretary of Revenue; Chairman of the Industrial Commission; and the Assistant Secretary of Commerce for the Division of Employment Security.
- 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: 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.

Prohibition on Employee Misclassification and Civil Penalties: The PCS would prohibit employee misclassification. Employee misclassification is defined as 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.

If an employer has engaged in employee misclassification and has been assessed back taxes, wages, benefits, penalties, or other monies by the relevant State agency as a result of misclassifying one or more

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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.

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 April 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 records of the Division would be subject to inspection by State and federal agencies as required by other statutory provisions.

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.

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 they have 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 certificate of license or take disciplinary action if a civil penalty was imposed on a licensed general contractor pursuant to a violation of the Act. 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 issued by the Board.

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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.

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.

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.

EFFECTIVE DATE: The act would become effective July 1, 2015.