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SENATE DRS35213-LR-4E* (10/13)

Short Title: Fair Competition & Emp. Classification Act. (Public)

Sponsors: Senators Tucker and Stein (Primary Sponsors).

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO ENACT THE FAIR COMPETITION AND EMPLOYEE CLASSIFICATION
3 ACT.

4 The General Assembly of North Carolina enacts:

5 SECTION 1. Chapter 95 of the General Statutes is amended by adding a new
6 Article to read:

7 "Article 4.

8 "Fair Competition and Employee Classification Act.

9 **"§ 95-275. Title.**

10 Title. – This Article shall be known and may be cited as the "Fair Competition and
11 Employee Classification Act."

12 **"§ 95-276. Definitions.**

13 The following definitions apply in this Article:

14 (1) Commissioner. – The Commissioner of Labor.

15 (2) Employ. – As defined in G.S. 95-25.2(3).

16 (3) Employee. – As defined in G.S. 95-25.2(4).

17 (4) Employer. – As defined in G.S. 95-25.2(5). The term includes the State and
18 its local political subdivisions and any agency or instrumentality of the State.
19 The term does not include employees of the United States government or
20 any political subdivision thereof.

21 (5) Employee-employer relationship. – The relationship presumed to exist when
22 work is performed by an individual for remuneration paid by an employer.

23 (6) Enforcement agencies. – The North Carolina Department of Labor,
24 Industrial Commission, Department of Revenue, and Department of
25 Commerce.

26 (7) Independent contractor. – An individual who performs services for an
27 employer and:

28 a. Who has been and will continue to be free from control or direction
29 by an employer over the performance of the services, both under the
30 individual's contract of service and in fact;

31 b. The service is, in fact, either outside the usual course of the business
32 of the employer; and

33 c. The individual is customarily engaged in an independently
34 established trade, occupation, profession, or business of the same
35 nature as that involved in the service performed.

36 (8) Interested party. – A person with an interest in compliance with this Article.



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- 1 (9) Knowingly. – Having actual knowledge of, or acting with deliberate
2 ignorance or reckless disregard for, the prohibition involved.
3 (10) Misclassification. – Wrongly designating an individual who performs
4 services for the employer as not an employee of the employer.
5 (11) Violate or violated. – Includes, but is not limited to, any intent to evade,
6 misrepresent, or willfully nondisclose the provisions of this Article.

7 **"§ 95-277. Notice.**

8 (a) If an employer engages an individual to perform services and that individual is not
9 considered by the employer to be an employee pursuant to G.S. 95-276, that employer shall
10 post and keep posted, in a conspicuous place on each job site where that individual performs
11 services and in each of the employer's offices in the State, in English and Spanish, the
12 following notice:

- 13 (1) Every individual working for a contractor has the right to be properly
14 classified by the contractor as an employee rather than an independent
15 contractor if the individual does not meet the requirements of an independent
16 contractor under the law known as the Employee Fair Classification Act.
17 (2) If you believe you or someone else has not been properly classified as an
18 employee or an independent contractor under the Employee Fair
19 Classification Act, you have the right to challenge this classification by
20 bringing an action in State civil district court.

21 (b) Every employer shall notify every person who performs services for remuneration
22 for that employer of that person's employment status as an employee or an independent
23 contractor at the time of hire. Such notification or classification by the employer shall not be
24 determinative of the employee's actual employment status.

25 **"§ 95-278. Prohibited conduct.**

- 26 (a) An employer shall not misclassify an employee as an independent contractor.
27 (b) A person shall not incorporate or form, or assist in the incorporation or formation of,
28 a corporation, partnership, limited liability corporation, or other entity, or pay or collect a fee
29 for use of a foreign or domestic corporation, partnership, limited liability corporation, or other
30 entity for the purpose, in whole or part, of facilitating, or evading detection of, a violation of
31 this section.
32 (c) No person shall require or request an individual to enter into an agreement or sign a
33 document that results in the misclassification of the individual as an independent contractor or
34 otherwise does not accurately reflect the individual's relationship with an employer.
35 (d) A person shall not knowingly conspire with, aid and abet, assist, advise, or facilitate
36 an employer with the intent of violating the provisions of this Article.

37 **"§ 95-279. Prohibited retaliation.**

38 (a) No person shall retaliate through discharge, or in any other manner, against any
39 individual for exercising any rights granted under this Article. Where an adverse action is taken
40 within 90 days of exercising any right under this Article, there shall be a rebuttable
41 presumption that such action was taken in retaliation for the exercise of those rights.

42 (b) No person shall retaliate against an individual if the individual does any of the
43 following:

- 44 (1) Makes a written or verbal complaint to an employer or to a federal or State
45 agency or at a public hearing, stating that provisions of this act allegedly
46 have been violated, or otherwise opposes any practice made unlawful under
47 this Article.
48 (2) Causes to be instituted any proceeding under or related to this Article.
49 (3) Testified or prepared to testify, assisted, or participated in any manner in an
50 investigation or proceeding under this Article.

51 **"§ 95-280. No waivers by agreement.**

1 No provision of this Article may be waived, contravened, or set aside by private agreement,
2 unless the agreement to waive is specifically authorized by this Article.

3 **"§ 95-281. Presumptions; violations.**

4 (a) If an employer asserts that an individual is not an employee, then the employer must
5 establish by a preponderance of the evidence that the individual is an independent contractor.
6 An employer's failure to withhold federal or State income or unemployment taxes or failure to
7 provide workers' compensation coverage shall not be a factor in determining whether an
8 individual is an independent contractor, nor shall the existence of a signed contract between the
9 employer and the individual.

10 (b) Each violation of this Article constitutes a separate violation for each individual
11 involved and for each day the violation continues.

12 (c) Prior to initiating any action under this section, the Commissioner shall exhaust all
13 administrative remedies, including giving the employer the opportunity to be heard on the
14 matters at issue and giving the employer notice of the pending action.

15 (d) In an action brought by the Commissioner in which a default judgment is entered,
16 the clerk shall order attorneys' fees of three hundred dollars (\$300.00) to be paid by the
17 defendant.

18 (e) Actions under this section must be brought within three years.

19 **"§ 95-282. Enforcement.**

20 (a) The Commissioner shall enforce and administer the provisions of this Article, and
21 the Commissioner or the Commissioner's authorized representative may hold hearings and
22 institute criminal and civil proceedings hereunder.

23 (b) The Commissioner or the Commissioner's authorized representative shall have
24 power to administer oaths and examine witnesses, issue subpoenas, compel the attendance of
25 witnesses and the production of papers, books, accounts, records, payrolls, documents, and take
26 depositions and affidavits in any proceeding hereunder.

27 (b1) Any employer who violates the provisions of G.S. 95-278 or any regulation issued
28 thereunder, shall be subject to a civil penalty not less than five hundred dollars (\$500.00) nor
29 greater than four thousand dollars (\$4,000) for each violation. In determining the amount of
30 such penalty, the appropriateness of the penalty to the size of the business of the person
31 charged and the gravity of the violation shall be considered. The determination by the
32 Commissioner shall be final, unless, within 15 days after receipt of notice thereof by certified
33 mail, the person charged with the violation takes exception to the determination, in which case
34 final determination of the penalty shall be made in an administrative proceeding pursuant to
35 Article 3 of Chapter 150B of the General Statutes and in a judicial proceeding pursuant to
36 Article 4 of Chapter 150B of the General Statutes.

37 (c) The amount of such penalty or damages as described in subsection (b1) of this
38 section when finally determined may be recovered in the manner set forth in G.S. 95-25.23B.

39 (d) Sums collected under this section by the Commissioner shall be paid into the
40 General Fund of the State Treasury.

41 (e) The Commissioner may enter into reciprocal agreements with the U.S. Department
42 of Labor or a corresponding agency of any other state or with the person, board, officer, or
43 commission authorized to act on behalf of the department or agency, for the collection in the
44 other state of claims and judgments for wages based upon investigations and findings made by
45 the Commissioner or his authorized representative. The Commissioner may, to the extent
46 provided for by any reciprocal agreement entered into by law or with an agency of another
47 state, as provided in this section, maintain actions in the courts of any other state for the
48 collection of claims or judgments for wages and may assign the claims and judgments to the
49 labor department or agency of the other state for collection to the extent that such an
50 assignment may be permitted or provided for by the law of that state or by reciprocal
51 agreement. Except as otherwise provided, the Commissioner may, upon the written consent of

1 the labor department or corresponding agency of any other state or of any person, board,
2 officer, or commission authorized to act on behalf of the department or agency, maintain
3 actions in the courts of this State upon assigned claims and judgments for wages arising in the
4 other state in the same manner and to the same extent that these actions by the Commissioner
5 are authorized when arising in this State. This subsection applies only to those states that
6 extend comity of enforcement to this State.

7 **"§ 95-283. Issuance of stop work order.**

8 (a) On receipt of information relating to a violation of the provisions of the Article, the
9 enforcement agencies may enter, during usual business hours, the place of business or
10 employment of any employer to determine compliance with this Article, and for such purpose
11 may examine payroll and other records and may interview employees, call hearings, administer
12 oaths, take testimony under oath, and take depositions.

13 (b) The heads of the enforcement agencies, for the purposes of this section, may issue
14 subpoenas for the attendance of witnesses and the production of books and records.

15 (c) A stop work order against an employer requiring the cessation of all business
16 operations of the employer may be issued by an enforcement agency if one or more of the
17 enforcement agencies determines after investigation that an employer is in violation of
18 G.S. 95-277. The stop work order:

19 (1) Shall be issued immediately but not later than 72 hours after the
20 determination is made by the enforcement agency.

21 (2) Shall be issued only against the employer found to be in violation and only
22 as to the specific place of business or employment for which the violation
23 exists.

24 (3) Is effective when served upon the employer or at the place of business or
25 employment.

26 (4) May be served at a place of business or employment by posting a copy of the
27 stop work order in a conspicuous location at the place of business or
28 employment.

29 (5) Shall remain in effect until the enforcement agency issues an order releasing
30 the stop work order upon a finding by the agency head that the employer has
31 come into compliance with G.S. 95-277.

32 (d) Any employer against which a stop work order is issued pursuant to subsection (c)
33 of this section may request a hearing before the enforcement agency issuing the order. The
34 request shall be made in writing to the head of the enforcement agency not more than 10 days
35 after the issuance of the order.

36 (e) A stop work order and any penalties imposed under G.S. 95-280 against a
37 corporation, partnership, or sole proprietorship for a violation of G.S. 95-277 shall be effective
38 against any successor entity that has one or more of the same principals or officers as the
39 corporation, partnership, or sole proprietorship against which the stop work order was issued
40 and are engaged in the same or equivalent trade or activity.

41 (f) The enforcement agencies shall adopt regulations, in accordance with the provisions
42 of this Article that are necessary to carry out this subsection.

43 **"§ 98-284. Debarments; other sanctions.**

44 (a) For any second or subsequent violation of this Article determined by the
45 Department which occurs within five years of an earlier violation, the Department shall add the
46 employer's or entity's name to a list to be posted on the Department's official Web site. Upon
47 such notice, the Department shall notify the violating employer or entity that no State or local
48 government contract shall be awarded to an employer or entity appearing on the list until four
49 years have elapsed from the date of the last violation.

50 **"§ 95-285. Cooperation.**

1 The Department of Labor, the Division of Employment Security, the Department of
2 Revenue, the Industrial Commission, the Department of Insurance, including county and city
3 inspectors, shall cooperate under this Article by sharing information concerning any suspected
4 misclassification by an employer or entity of one or more of its employees as independent
5 contractors. Upon determining that an employer or entity has misclassified employees as
6 independent contractors in violation of this Act, the Department of Labor shall notify the
7 Division of Employment Security, the Department of Revenue, the State Auditor, and the
8 Industrial Commission who shall be obliged to check the employer's or entity's compliance
9 with their laws, utilizing their own definitions, standards, and procedures.

10 **SECTION 2.** G.S. 95-241(a)(1) reads as rewritten:

11 "(a) No person shall discriminate or take any retaliatory action against an employee
12 because the employee in good faith does or threatens to do any of the following:

- 13 (1) File a claim or complaint, initiate any inquiry, investigation, inspection,
14 proceeding or other action, or testify or provide information to any person
15 with respect to any of the following:
- 16 a. Chapter 97 of the General Statutes.
 - 17 b. Article 2A or Article 16 of this Chapter.
 - 18 c. Article 2A of Chapter 74 of the General Statutes.
 - 19 d. G.S. 95-28.1.
 - 20 e. Article 16 of Chapter 127A of the General Statutes.
 - 21 f. G.S. 95-28.1A.
 - 22 g. Article 52 of Chapter 143 of the General Statutes.
 - 23 h. Article 5F of Chapter 90 of the General Statutes.
 - 24 i. Article 4 of Chapter 95 of the General Statutes."

25 **SECTION 3.** This act is effective when it becomes law and applies to employment
26 existing on or after that date.