

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2015

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HOUSE DRH20176-LRa-63C (02/26)

Short Title: Employee Fair Classification Act. (Public)

Sponsors: Representatives Pendleton, Blust, Szoka, and Bishop (Primary Sponsors).

Referred to:

1 A BILL TO BE ENTITLED
2 AN ACT TO ENACT THE EMPLOYEE FAIR CLASSIFICATION ACT.
3 The General Assembly of North Carolina enacts:

4
5 **EMPLOYEE MISCLASSIFICATION**

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

8 "Article 4.

9 "Employee Fair Classification Act.

10 "**§ 95-275. Title.**

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

12 "**§ 95-276. Definitions; scope.**

13 (a) The following definitions apply in this Article:

14 (1) Employ. – To suffer or permit to work. An entity or individual shall not be
15 deemed to be an employer of an individual hired or otherwise engaged by or
16 through the entity's or individual's independent contractor.

17 (2) Employee. – Any individual that is defined as an employee by either
18 G.S. 95-25.2(4), 95-47.1(6), 95-174, 96-1(10), 97-2(2), or 105-163.1(4). The
19 term does not mean an individual who is an independent contractor under
20 G.S. 95-280.

21 (3) Employee misclassification. – Avoiding tax liabilities and other obligations
22 imposed by Chapter 95, Chapter 96, Chapter 97, or Chapter 105 of the
23 General Statutes by misclassifying an employee as an independent
24 contractor.

25 (4) Employee Misclassification Task Force or Task Force. – The North Carolina
26 Employee Misclassification Task Force as established by this Article.

27 (5) Employer. – Any entity or individual that employs one or more employees
28 as defined by subdivision (2) of this subsection.

29 (b) Nothing in this Article shall be construed, or is intended, to change the definition of
30 "employer" or "employee" under any other provision of law.

31 (c) The provisions G.S. 95-280 are intended to codify the holding in *Hayes v. Board of*
32 *Trustees of Elon College*, 224 N.C. 11 (1944).

33 "**§ 95-277 Establishment of Employee Misclassification Task Force; appointment of**
34 **director; salaries; other staff.**

35 (a) There is hereby created the North Carolina Employee Misclassification Task Force.



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1 **(b)** The Governor shall appoint a director of the Employee Misclassification Task Force
2 who shall serve a term of four years and devote full-time effort to the duties of the Task Force.
3 The director shall be the chief executive officer of the Employee Misclassification Task Force.
4 The director shall exercise authority in accordance with the provisions of Chapter 126 of the
5 General Statutes and the rules and policies of the State Human Resources Commission.
6 Notwithstanding the provisions of this Chapter, the director shall have such authority as is
7 necessary to direct and oversee the Task Force. The director may delegate any duties and
8 responsibilities as may be necessary to ensure the proper management of the Task Force.
9 Notwithstanding the provisions of this Chapter, Chapter 143A, and Chapter 143B of the
10 General Statutes, the director may hire or fire personnel and transfer personnel within the Task
11 Force. The director's salary shall be as provided in the Current Operations Appropriations Act.

12 **(c)** Appointment of the director is subject to confirmation by the General Assembly by
13 joint resolution. The name of director to be appointed by the Governor shall be submitted by
14 the Governor to the General Assembly for confirmation by the General Assembly on or before
15 April 1 of the year of expiration of the preceding term. If the Governor fails to timely submit
16 nominations, the General Assembly shall appoint to fill the succeeding term upon the joint
17 recommendation of the President Pro Tempore of the Senate and the Speaker of the House of
18 Representatives in accordance with G.S. 120-121 not inconsistent with this section.

19 **(d)** The Employee Misclassification Task Force shall be provided with adequate
20 funding to provide the Task Force with investigators and staff necessary to meet the duties set
21 forth in this Article. The Task Force shall be provided with adequate offices in which the Task
22 Force's records shall be kept and its official business transacted during regular business hours.
23 The Task Force shall also be provided with necessary office furniture, stationery, and other
24 supplies.

25 **(e)** The Office of the State Controller shall ensure that the Task Force is provided with
26 all necessary access to the Government Data Analytic Center and all other information
27 technology services.

28 **"§ 95-278. Powers and duties of the Employee Misclassification Task Force.**

29 **(a)** The Employee Misclassification Task Force shall have the following powers and
30 duties:

- 31 **(1)** Be available during business hours to receive reports of employee
32 misclassification by telephonic, written, or electronic communication.
- 33 **(2)** Investigate reports of employee misclassification, coordinate with, and assist
34 all relevant State agencies in recovering any back taxes, wages, benefits,
35 penalties, or other monies owed as a result of an employer engaging in
36 employee misclassification.
- 37 **(3)** Assess administrative civil penalties for instances of employee
38 misclassification as set forth in this Article.
- 39 **(4)** Where provided by law, coordinate with relevant State agencies and District
40 Attorneys' offices in the prosecution of employers and individuals who fail
41 to pay civil assessments or penalties assessed as a result of the employer or
42 individual's involvement in employee misclassification.
- 43 **(5)** Provide all relevant information pertaining to each instance of reported
44 employee misclassification to the North Carolina Department of Labor, the
45 North Carolina Department of Revenue, the North Carolina Division of
46 Employment Security, and the North Carolina Industrial Commission to
47 facilitate investigation of potential violations of Chapter 95, Chapter 96,
48 Chapter 97, or Chapter 105 of the General Statutes.
- 49 **(6)** Create a publicly available notice that includes the definition of employee
50 misclassification and indicates the civil penalties provided for in
51 G.S. 95-279.

1 (7) Develop methods and strategies for information sharing between State
2 agencies in order to proactively identify possible instances of employee
3 misclassification.

4 (8) Develop methods and strategies to educate employers, employees, and the
5 public about proper classification of employees and the prevention of
6 employee misclassification.

7 (9) Establish training modules and materials pertaining to the investigation and
8 enforcement of incidents of employee misclassification for use by State
9 agency investigators and law enforcement agencies.

10 (b) The director shall appoint an informal advisory council to advise the director on
11 issues within the jurisdiction of the Employee Misclassification Task Force. The members of
12 the council shall include, at a minimum:

13 (1) The following officers or the officer's designee:

14 a. Commissioner of Labor.

15 b. Secretary of Revenue.

16 c. Chairman of the Industrial Commission.

17 d. Assistant Secretary of Commerce for the Division of Employment
18 Security.

19 (2) A representative of workers.

20 (3) A representative of employers.

21 The members of the council shall not receive compensation, per diem or expense
22 reimbursement, from the State Treasury for their service on the advisory council.

23 (c) No later than October 1 of each year, the Employee Misclassification Task Force
24 shall publish annually to the Office of the Governor and to the Joint Legislative Commission on
25 Governmental Operations a report of the administration of this Article, together with any
26 recommendations as the Task Force deems advisable. This report shall include, at a minimum,
27 the number of reports of employee misclassification received, the number and amount of back
28 taxes, wages, benefits, penalties or other monies assessed, the amount of back taxes, wages,
29 benefits, penalties or other monies collected, and the number of cases referred to each State
30 agency.

31 **§ 95-279. Employee misclassification prohibited; additional civil penalties for repeated**
32 **instances of misclassification; employer appeals.**

33 (a) Employee misclassification is prohibited.

34 (b) Any employer who is found by the Task Force to have engaged in employee
35 misclassification after being assessed any back taxes, wages, benefits, penalties or other monies
36 by any State agency as a result of misclassifying one or more employees within the previous
37 three calendar years shall be assessed a civil penalty of no greater than one thousand dollars
38 (\$1,000) per misclassified employee for any future instances of employee misclassification. In
39 determining the amount of the penalty to be assessed, the Task Force shall consider the degree
40 of willfulness or negligence by the employer in engaging in the employee misclassification.

41 If the Task Force finds that an employer has engaged in employee misclassification or any
42 other violation of this Article, the employer has the right to appeal the final finding and any
43 accompanying penalty.

44 Any employer found by the Task Force to have engaged in employee misclassification or
45 any other violation of this Article may, within 60 days of receiving written notification of a
46 final finding by the Task Force, appeal the final finding and any accompanying penalty or other
47 sanction by either:

48 (1) Commencing a contested case under Chapter 150B of the General Statutes;
49 or

50 (2) Filing a petition in the superior court of Wake County or in the superior
51 court of the county where the events giving rise to the finding arose.

1 The procedure shall be the same as in all other contested cases or civil actions, except that the
2 review of the Task Force's findings and any accompanying penalties or sanctions shall be de
3 novo for both factual findings and questions of law. Enforcement of the penalty shall be made
4 by the Office of the Attorney General. The clear proceeds of penalties provided for in this
5 subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with
6 G.S. 115C-457.2.

7 (c) Nothing in this section shall be construed to create a private right of action, at law or
8 in equity, for the activities prohibited herein.

9 **"§ 95-280. Determination of independent contractor status.**

10 (a) The manner of compensation shall not be the sole factor in determining whether an
11 individual is an independent contractor for purposes of this Article. The following factors shall
12 be considered in determining whether an individual is an independent contractor:

13 (1) Whether the individual is engaged in an independent business, calling, or
14 occupation.

15 (2) Whether the individual is to have the independent use of his or her special
16 skill, knowledge, or training in the execution of the work.

17 (3) Whether the individual is doing a specified piece of work at a fixed price or
18 for a lump sum or upon a quantitative basis.

19 (4) Whether the individual is not subject to discharge because he or she adopts
20 one method of doing the work rather than another.

21 (5) Whether the individual is in the regular employ of the contracting party.

22 (6) Whether the individual is free to use such assistants as he or she may think
23 proper.

24 (7) Whether the individual has full control over such assistants.

25 (8) Whether the individual selects his or her own time.

26 The presence of one or more of the factors is not controlling, nor is the presence of all of the
27 foregoing factors required in determining whether an individual is an independent contractor.

28 (b) Other factors consistent with the opinion set forth in *Hayes v. Board of Trustees of*
29 *Elon College*, 224 N.C. 11 (1944) may also be considered in determining independent
30 contractor status.

31 **"§ 95-281. Temporary amnesty program.**

32 (a) The Employee Misclassification Task Force shall establish and administer a
33 temporary amnesty program for the purpose of encouraging voluntary self-reporting by
34 employers currently engaging in employee misclassification. Every employer participating in
35 the temporary amnesty program shall be immune from the civil penalties provided for in
36 G.S. 95-279 for past instances of employee misclassification that are voluntarily self-reported
37 by the employer in accordance with the procedures of the temporary amnesty program.

38 (b) The Task Force shall establish procedures for participation in the temporary
39 amnesty program. These procedures shall require, at a minimum, that a participating employer:

40 (1) File an application with the Task Force on a form prescribed by the Task
41 Force on or before April 1, 2016. This form shall require, at a minimum, the
42 employer's name, physical address, mailing address, telephone number,
43 Social Security number or taxpayer ID number, and disclosure of all actual
44 or potential instances of employee misclassification. If available, this form
45 shall require the employer's registered agent, drivers license number, license
46 number(s) and issuing agency of all licenses issued by a State licensing
47 board.

48 (2) Comply with any and all determinations made or directives issued by the
49 Task Force pertaining to the employer's application and compliance with this
50 Article.

1 (c) Nothing in this section shall be construed to limit the liability of a participating
2 employer in any civil or criminal matter not provided for by this Article.

3 **"§ 95-282. Confidentiality; access to records.**

4 The records of the Employee Misclassification Task Force that are not civil penalty
5 assessments under G.S. 95-270(b), or final orders relating to an appeal of a civil penalty
6 assessment, insofar as they refer to reported violations, investigations, or other enforcement
7 actions taken by the Task Force, are not public records under G.S. 132-1, but are subject to
8 inspection by State and federal agencies as required by the provisions of this Chapters 95, 96,
9 97, and 105 of the General Statutes.

10 **"§ 95-283. Occupational licensing boards and commissions; notice requirement;**
11 **applicant certification; sanctions.**

12 (a) Every State occupational licensing board or commission that is authorized to issue
13 any license, permit, or certification shall include on every application for licensure, permit, or
14 certification, or application for renewal of the same, a certification that the applicant has read
15 and understands the employee misclassification notice set forth in G.S. 95-278(a)(7).

16 (b) Every applicant for a license, permit, or certification issued by a State occupational
17 licensing board or commission shall truthfully certify on the appropriate application that the
18 applicant has read and understands the employee misclassification notice set forth in
19 G.S. 95-278(a)(7).

20 (c) An occupational licensing board or commission shall deny the license, permit, or
21 certification application of any applicant who fails to comply with the certification requirement
22 set forth in subsection (b) of this section.

23 (d) Whenever the licensee, permittee, or certificate holder of an occupational licensing
24 board or commission is found by the Task Force to have engaged in employee
25 misclassification, the occupational licensing board or commission may revoke such license,
26 permit, or certificate and deny and refuse to grant any renewal or other application therefor
27 until the licensee, permittee, certificate holder or applicant shall have furnished evidence
28 sufficient to the Task Force of compliance with G.S. 95-279(a)."

29 **SECTION 2.** G.S. 95-25.15(c) reads as rewritten:

30 "(c) A poster summarizing the major provisions of this Article shall be displayed in
31 every establishment subject to this Article. This poster shall also include notice indicating the
32 following:

33 (1) Any worker who is defined as an employee by either G.S. 95-25.2(4),
34 95-47.1(6), 95-174, 96-1(10), 97-2(2), or 105-163.1(4) shall be treated as an
35 employee unless the individual is an independent contractor.

36 (2) Any employee who believes that they have been misclassified as an
37 independent contractor by their employer may report the suspected
38 misclassification to the Employee Misclassification Task Force.

39 (3) The physical location, mailing address, telephone number, and e-mail
40 address where alleged incidents of employee misclassification may be
41 reported to the Employee Misclassification Task Force."

42 **SECTION 3.** G.S. 97-2(2) reads as rewritten:

43 **"§ 97-2. Definitions.**

44 When used in this Article, unless the context otherwise requires:

45 ...

46 (2) Employee. – The term "employee" means every person engaged in an
47 employment under any appointment or contract of hire or apprenticeship,
48 express or implied, oral or written, including aliens, and also minors,
49 whether lawfully or unlawfully employed, but excluding persons whose
50 employment is both casual and not in the course of the trade, business,
51 profession, or occupation of his employer, and as relating to those so

1 employed by the State, the term "employee" shall include all officers and
2 employees of the State, including such as are elected by the people, or by the
3 General Assembly, or appointed by the Governor to serve on a per diem,
4 part-time or fee basis, either with or without the confirmation of the Senate;
5 as relating to municipal corporations and political subdivisions of the State,
6 the term "employee" shall include all officers and employees thereof,
7 including such as are elected by the people. The term "employee" shall
8 include members of the North Carolina National Guard while on State active
9 duty under orders of the Governor and members of the North Carolina State
10 Defense Militia while on State active duty under orders of the Governor. The
11 term "employee" shall include deputy sheriffs and all persons acting in the
12 capacity of deputy sheriffs, whether appointed by the sheriff or by the
13 governing body of the county and whether serving on a fee basis or on a
14 salary basis, or whether deputy sheriffs serving upon a full-time basis or a
15 part-time basis, and including deputy sheriffs appointed to serve in an
16 emergency, but as to those so appointed, only during the continuation of the
17 emergency. The sheriff shall furnish to the board of county commissioners a
18 complete list of all deputy sheriffs named or appointed by him immediately
19 after their appointment and notify the board of commissioners of any
20 changes made therein promptly after such changes are made. Any reference
21 to an employee who has been injured shall, when the employee is dead,
22 include also the employee's legal representative, dependents, and other
23 persons to whom compensation may be payable: Provided, further, that any
24 employee, as herein defined, of a municipality, county, or of the State of
25 North Carolina, while engaged in the discharge of the employee's official
26 duty outside the jurisdictional or territorial limits of the municipality, county,
27 or the State of North Carolina and while acting pursuant to authorization or
28 instruction from any superior officer, shall have the same rights under this
29 Article as if such duty or activity were performed within the territorial
30 boundary limits of their employer.

31 Every executive officer elected or appointed and empowered in
32 accordance with the charter and bylaws of a corporation shall be considered
33 as an employee of such corporation under this Article.

34 Any such executive officer of a corporation may, notwithstanding any
35 other provision of this Article, be exempt from the coverage of the
36 corporation's insurance contract by such corporation's specifically excluding
37 such executive officer in such contract of insurance, and the exclusion to
38 remove such executive officer from the coverage shall continue for the
39 period such contract of insurance is in effect, and during such period such
40 executive officers thus exempted from the coverage of the insurance contract
41 shall not be employees of such corporation under this Article.

42 All county agricultural extension service employees who do not receive
43 official federal appointments as employees of the United States Department
44 of Agriculture and who are field faculty members with professional rank as
45 designated in the memorandum of understanding between the North
46 Carolina Agricultural Extension Service, North Carolina State University, A
47 & T State University, and the boards of county commissioners shall be
48 deemed to be employees of the State of North Carolina. All other county
49 agricultural extension service employees paid from State or county funds
50 shall be deemed to be employees of the county board of commissioners in

1 the county in which the employee is employed for purposes of workers'
2 compensation.

3 The term "employee" shall also include members of the Civil Air Patrol
4 currently certified pursuant to G.S. 143B-1031(a) when performing duties in
5 the course and scope of a State-approved mission pursuant to Subpart C of
6 Part 5 of Article 13 of Chapter 143B of the General Statutes.

7 "Employee" shall not include any person performing voluntary service as
8 a ski patrolman who receives no compensation for such services other than
9 meals or lodging or the use of ski tow or ski lift facilities or any combination
10 thereof.

11 Any sole proprietor or partner of a business or any member of a limited
12 liability company may elect to be included as an employee under the
13 workers' compensation coverage of such business if he is actively engaged in
14 the operation of the business and if the insurer is notified of his election to
15 be so included. Any such sole proprietor or partner or member of a limited
16 liability company shall, upon such election, be entitled to employee benefits
17 and be subject to employee responsibilities prescribed in this Article.

18 "Employee" shall include an authorized pickup firefighter of the North
19 Carolina Forest Service of the Department of Agriculture and Consumer
20 Services when that individual is engaged in emergency fire suppression
21 activities for the North Carolina Forest Service. As used in this section,
22 "authorized pickup firefighter" means an individual who has completed
23 required fire suppression training as a wildland firefighter and who is
24 available as needed by the North Carolina Forest Service for emergency fire
25 suppression activities, including immediate dispatch to wildfires and standby
26 for initial attack on fires during periods of high fire danger.

27 ~~It shall be a rebuttable presumption that the term "employee" shall not~~
28 ~~include any person performing services in the sale of newspapers or~~
29 ~~magazines to ultimate consumers under an arrangement whereby the~~
30 ~~newspapers or magazines are to be sold by that person at a fixed price and~~
31 ~~the person's compensation is based on the retention of the excess of the fixed~~
32 ~~price over the amount at which the newspapers or magazines are charged to~~
33 ~~the person."~~

34 **SECTION 4.** G.S. 97-5.1 reads as rewritten:

35 ~~"§ 97-5.1. Presumption that taxicab drivers are independent contractors.~~

36 ~~(a) It shall be a rebuttable presumption under this Chapter that any person who~~
37 ~~operates, and who has an ownership or leasehold interest in, a passenger motor vehicle that is~~
38 ~~operated as a taxicab is an independent contractor for the purposes of this Chapter and not an~~
39 ~~employee as defined in G.S. 97-2. The presumption is not rebutted solely (i) because the~~
40 ~~operator is required to comply with rules and regulations imposed on taxicabs by the local~~
41 ~~governmental unit that licenses companies, taxicabs, or operators or (ii) because a taxicab~~
42 ~~accepts a trip request to be at a specific place at a specific time, but the presumption may be~~
43 ~~rebutted by application of the common law test for determining employment status.~~

44 ~~(b) The following definitions apply in this section:~~

45 ~~(1) Lease.—A contract under which the lessor provides a vehicle to a lessee for~~
46 ~~consideration.~~

47 ~~(2) Leasehold.—Includes, but is not limited to, a lease for a shift or a longer~~
48 ~~period.~~

49 ~~(3) Passenger motor vehicle that is operated as a taxicab.—Any vehicle that:~~

50 ~~a. Has a passenger seating capacity that does not exceed seven persons;~~
51 ~~and~~

- b. ~~Is transporting persons, property, or both on a route that begins or ends in this State and either:~~
 - 1. ~~Carries passengers for hire when the destination and route traveled may be controlled by a passenger and the fare is calculated on the basis of any combination of an initial fee, distance traveled, or waiting time; or~~
 - 2. ~~Is in use under a contract between the operator and a third party to provide specific service to transport designated passengers or to provide errand services to locations selected by the third party."~~

LOCAL GOVERNMENT BUSINESS REGULATIONS

SECTION 5.(a) G.S. 153A-134 is amended by adding a new subsection to read:

"(d) An applicant subject to regulation and licensure by a county under this section shall certify to the county that the applicant has read and understands the employee misclassification notice as provided by G.S. 95-278(a)(7)."

SECTION 5.(b) G.S. 160A-194 is amended by adding a new subsection to read:

"(d) An applicant subject to regulation and licensure by a city under this section shall certify to the county that the applicant has read and understands the employee misclassification notice as provided by G.S. 95-278(a)(7)."

APPROPRIATIONS

SECTION 6.(a) There is appropriated from the General Fund to the Industrial Commission the sum of two hundred ninety-three thousand dollars (\$293,000) for the 2015-2016 fiscal year and the sum of two hundred ninety-three thousand dollars (\$293,000) for the 2016-2017 fiscal year to establish up to five new positions whose duties will include reviewing quarterly employer wage and earnings reports and comparing those to the Worker's Compensation insurance policies to detect fraud and employee misclassification. The Industrial Commission shall consult with the Department of Revenue, the Division of Employment Security of the Department of Commerce, and the Department of Labor in hiring staff for this function.

SECTION 6.(b) There is appropriated from the General Fund to the Industrial Commission the sum of seventeen thousand five hundred dollars (\$17,500) for the 2015-2016 fiscal year for nonrecurring costs associated with the positions authorized by this section.

SEVERABILITY

SECTION 7. If any section or provision of this act is declared unconstitutional or invalid by the courts, it does not affect the validity of this act as a whole or any part other than the part so declared to be unconstitutional or invalid.

EFFECTIVE DATE

SECTION 8. This act is effective when it becomes law.