

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2015

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SENATE BILL 694
PROPOSED COMMITTEE SUBSTITUTE S694-PCS35275-TS-5

Short Title: Employee Misclassification Reform.

(Public)

Sponsors:

Referred to:

March 30, 2015

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 **PART I. EMPLOYEE FAIR CLASSIFICATION ACT**

6 **SECTION 1.1.** Chapter 143 of the General Statutes is amended by adding a new
7 Article to read:

8 "Article 81.

9 "Employee Fair Classification Act.

10 **§ 143-760. Title.**

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

12 **§ 143-761. Definitions; scope.**

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

14 (1) Employ. – As defined by G.S. 95-25.2(3).

15 (2) Employee. – Any individual that is defined as an employee by either
16 G.S. 95-25.2(4), 96-1(10), 97-2(2), or 105-163.1(4). The term does not mean
17 an individual who is an independent contractor.

18 (3) Employee Classification Division or Division. – The Employee
19 Classification Division within the OSBM.

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

23 (5) Employer. – Any individual or entity that employs one or more employees
24 as defined by G.S. 97-2(3).

25 (6) OSBM. – Office of State Budget and Management.

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

28 **§ 143-762. Employee Classification Division.**

29 (a) The Employee Classification Division is established within the Office of State
30 Budget and Management.

31 (b) The State Budget Director shall appoint a director of the Division to serve at the
32 Budget Director's pleasure with such authority as the Director deems necessary to direct and
33 oversee the Division in carrying out the purposes of this Article. The director shall be exempt
34 from the State Human Resources Act and shall devote his or her entire time to the duties of the
35 Division. The director may delegate any duties and responsibilities as may be necessary to



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1 ensure the proper management of the Division. The director's salary shall be set by the State
2 Budget Director.

3 (c) The State Budget Director may employ clerical staff, investigators, and other staff
4 within the Division as is necessary for the Division to perform its duties under this Article.
5 Notwithstanding Chapters 126, 143A, and 143B of the General Statutes or any other provision
6 of law, the director may hire or fire personnel and transfer personnel within the Division. The
7 Division shall be provided with adequate offices in which the Division's records shall be kept
8 and its official business transacted during regular business hours. The Division shall also be
9 provided with necessary office furniture, stationery, and other supplies.

10 (d) The Office of the State Chief Information Officer shall ensure that the Division is
11 provided with all necessary access to the Government Data Analytics Center and all other
12 information technology services.

13 **"§ 143-763. Division powers and duties.**

14 (a) The Division shall have the following duties:

- 15 (1) Be available during business hours to receive reports of employee
16 misclassification by telephonic, written, or electronic communication.
- 17 (2) Investigate reports of employee misclassification, coordinate with, and assist
18 all relevant State agencies in recovering any back taxes, wages, benefits,
19 penalties, or other monies owed as a result of an employer engaging in
20 employee misclassification.
- 21 (3) Assess administrative civil penalties for instances of employee
22 misclassification as set forth in G.S. 143-765.
- 23 (4) Refer contested penalty assessments to the Office of Administrative
24 Hearings for an in-person hearing.
- 25 (5) Where provided by law, coordinate with relevant State agencies and District
26 Attorneys' offices in the prosecution of employers and individuals who fail
27 to pay civil assessments or penalties assessed as a result of the employer or
28 individual's involvement in employee misclassification.
- 29 (6) Provide all relevant information pertaining to each instance of reported
30 employee misclassification to the North Carolina Department of Labor, the
31 North Carolina Department of Revenue, the North Carolina Division of
32 Employment Security, and the North Carolina Industrial Commission to
33 facilitate investigation of potential violations of Chapter 143, 96, 97, or 105
34 of the General Statutes.
- 35 (7) Create a publicly available notice that includes the definition of employee
36 misclassification and indicates the civil penalties provided for in
37 G.S. 143-765.
- 38 (8) Develop methods and strategies for information sharing between State
39 agencies in order to proactively identify possible instances of employee
40 misclassification.
- 41 (9) Develop methods and strategies to educate employers, employees, and the
42 public about proper classification of employees and the prevention of
43 employee misclassification.
- 44 (10) Establish training modules and materials pertaining to the investigation and
45 enforcement of incidents of employee misclassification for use by State
46 agency investigators and law enforcement agencies.

47 (b) The director shall appoint an informal advisory council to advise the director on
48 issues within the jurisdiction of the Division. The members of the advisory council shall
49 include, at a minimum:

- 50 (1) The following officers or the officer's designee:
 - 51 a. Commissioner of Labor.

- b. Secretary of Revenue.
- c. Chairman of the Industrial Commission.
- d. Assistant Secretary of Commerce for the Division of Employment Security.

(2) A representative of workers in this State.

(3) A representative of employers in this State.

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

(c) No later than October 1 of each year, the Division shall publish annually to the Office of the Governor and to the Joint Legislative Commission on Governmental Operations a report of the administration of this Article, together with any recommendations as the Division deems advisable. This report shall include, at a minimum, 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.

"§ 143-764. Determination of independent contractor status.

(a) The following factors shall be considered in determining whether an individual is an independent contractor for purposes of this Article:

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

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

(c) The provisions of this section are intended to codify the holding in Hayes v. Board of Trustees of Elon College, 224 N.C. 11 (1944). Other factors consistent with that holding may also be considered in making a determination under this section.

"§ 143-765. Employee misclassification prohibited; civil penalties; repeated instances of misclassification.

(a) Employee misclassification is prohibited.

(b) Any employer who is found by the Division to have engaged in employee misclassification after being assessed any 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 shall be assessed a civil penalty of no greater than one thousand dollars (\$1,000) per misclassified employee for any future instances of employee misclassification. In determining the amount of the penalty to be assessed, the Division shall consider the degree of willfulness or negligence by the employer in engaging in the employee misclassification. The penalty herein provided shall be assessed by the Division administratively, with the right to a hearing conducted by the Industrial Commission if requested in writing within 30 days after notice of the assessment of the penalty. Enforcement

1 of the penalty shall be made by the Office of the Attorney General. The clear proceeds of
2 penalties provided for in this subsection shall be remitted to the Civil Penalty and Forfeiture
3 Fund in accordance with G.S. 115C-457.2.

4 (c) Nothing in this section shall be construed to create a private right of action, at law or
5 in equity, for the activities prohibited by this Article.

6 **"§ 143-766. Temporary amnesty program.**

7 (a) The Division shall establish and administer a temporary amnesty program for the
8 purpose of encouraging voluntary self-reporting by employers currently engaging in employee
9 misclassification. Every employer participating in the temporary amnesty program shall be
10 immune from the civil penalties provided for in G.S. 143-765 for past instances of employee
11 misclassification that are voluntarily self-reported by the employer in accordance with the
12 procedures of the temporary amnesty program.

13 (b) The Division shall establish procedures for participation in the temporary amnesty
14 program. These procedures shall require, at a minimum, that a participating employer:

15 (1) File an application with the Division on a form prescribed by the Division on
16 or before April 1, 2016. This form shall require, at a minimum, the
17 employer's name, physical address, mailing address, telephone number,
18 Social Security number or taxpayer ID number, and disclosure of all actual
19 or potential instances of employee misclassification. If available, this form
20 shall require the employer's registered agent, drivers license number, license
21 number(s), and issuing agency of all licenses issued by a State licensing
22 board.

23 (2) Comply with any and all determinations made or directives issued by the
24 Division pertaining to the employer's application and compliance with this
25 Article.

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

28 **"§ 143-767. Occupational licensing boards and commissions; notice requirement;**
29 **applicant certification.**

30 (a) Every State occupational licensing board or commission that is authorized to issue
31 any license, permit, or certification shall include on every application for licensure, permit, or
32 certification, or application for renewal of the same, a certification that the applicant has read
33 and understands the employee misclassification notice set forth in G.S. 143-763(a)(7).

34 (b) Every applicant for a license, permit, or certification issued by a State occupational
35 licensing board or commission shall truthfully certify on the appropriate application that the
36 applicant has read and understands the employee misclassification notice set forth in
37 G.S. 143-763(a)(7).

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

41 **"§ 143-768. Confidentiality; access to records.**

42 The records of the Division that are not civil penalty assessments or final orders relating to
43 an appeal of a civil penalty assessment, insofar as they refer to reported violations,
44 investigations, or other enforcement actions taken by the Division, are not public records under
45 G.S. 132-1, but are subject to inspection by State and federal agencies as required by the
46 provisions of this Article and Chapters 95, 96, 97, and 105 of the General Statutes."

47 **SECTION 1.2.** G.S. 97-5.1 is repealed.

48
49 **PART II. MISCLASSIFICATION NOTICE ADDED TO NCDOL POSTERS**

50 **SECTION 2.1.** G.S. 95-25.15(c) reads as rewritten:

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

- 4 (1) Any worker who is defined as an employee by either G.S. 95-25.2(4),
5 95-47.1(6), 143-174, 96-1(10), 97-2(2), or 105-163.1(4) shall be treated as
6 an employee unless the individual is an independent contractor.
7 (2) Any employee who believes that they have been misclassified as an
8 independent contractor by their employer may report the suspected
9 misclassification to the Employee Classification Division.
10 (3) The physical location, mailing address, telephone number, and e-mail
11 address where alleged incidents of employee misclassification may be
12 reported to the Employee Classification Division."
13

14 **PART III. SANCTIONS AND OTHER REQUIREMENTS CONCERNING EMPLOYEE** 15 **MISCLASSIFICATION**

16 **SECTION 3.1.** G.S. 87-11 reads as rewritten:

17 **"§ 87-11. Revocation of license; charges of fraud, negligence, incompetency, etc.; hearing**
18 **thereon; reissuance of certificate.**

19 (a) The Board shall have the power to refuse to issue or renew or revoke, suspend, or
20 restrict a certificate of license or to issue a reprimand or take other disciplinary action if a
21 general contractor licensed under this Article is found guilty of any fraud or deceit in obtaining
22 a license, or gross negligence, incompetency, or misconduct in the practice of his or her
23 profession, or willful violation of any provision of this ~~Article.~~ Article, or if a penalty was
24 imposed pursuant to G.S. 143-765(b) that has been upheld upon final adjudication. The Board
25 shall also have the power to revoke, suspend, or otherwise restrict the ability of any person to
26 act as a qualifying party for a license to practice general contracting, as provided in
27 G.S. 87-10(c), for any copartnership, corporation or any other organization or combination, if
28 that person committed any act in violation of the provisions of this section and the Board may
29 take disciplinary action against the individual license held by that person.

30 (a1) Any person may prefer charges of fraud, deceit, negligence, or misconduct against
31 any general contractor licensed under this Article. The charges shall be in writing and sworn to
32 by the complainant and submitted to the Board. The charges, unless dismissed without hearing
33 by the Board as unfounded or trivial, shall be heard and determined by the Board in accordance
34 with the provisions of Chapter 150B of the General Statutes.

35 (b) The Board shall adopt and publish guidelines, consistent with the provisions of this
36 Article, governing the suspension and revocation of licenses. These guidelines shall include
37 references to the prohibition of employee misclassification under Article 81 of Chapter 143 of
38 the General Statutes and state that engaging in employee misclassification is grounds for
39 revocation of a license issued under this Article.

40 (c) The Board shall establish and maintain a system whereby detailed records are kept
41 regarding complaints against each licensee. This record shall include, for each licensee, the date
42 and nature of each complaint, investigatory action taken by the Board, any findings by the
43 Board, and the disposition of the matter.

44 (d) The Board may reissue a license to any person, firm or corporation whose license
45 has been revoked: Provided, five or more members of the Board vote in favor of such
46 reissuance for reasons the Board may deem sufficient.

47 The Board shall immediately notify the Secretary of State of its findings in the case of the
48 revocation of a license or of the reissuance of a revoked license.

49 A certificate of license to replace any certificate lost, destroyed or mutilated may be issued
50 subject to the rules and regulations of the Board.

1 (e) The Board shall be entitled to recover its reasonable administrative costs associated
2 with the investigation and prosecution of a violation of this Article or rules or regulations of the
3 Board up to a maximum of five thousand dollars (\$5,000) for any licensee or qualifying party
4 found to have committed any of the following:

5 (1) Fraud or deceit in obtaining a license.

6 (2) Gross negligence, incompetency, or misconduct in the practice of general
7 contracting.

8 (3) Willful violation of any provision of this Article."

9 **SECTION 3.2.** G.S. 143-59.2(a) reads as rewritten:

10 "(a) Ineligible Vendors. – A vendor is not entitled to enter into a contract for goods or
11 services with any department, institution, or agency of the State government subject to the
12 provisions of this Article if any officer or director of the vendor, or any owner if the vendor is
13 an unincorporated business entity, within five years prior to the date of the bid solicitation, has
14 been assessed a civil penalty pursuant to G.S. 143-765(b) that has been upheld upon final
15 adjudication, or within 10 years immediately prior to the date of the bid solicitation, has been
16 convicted of any violation of Chapter 78A of the General Statutes or the Securities Act of 1933
17 or the Securities Exchange Act of 1934."

18 **SECTION 3.3.** G.S. 153A-134 is amended by adding a new subsection to read:

19 "(d) An applicant subject to regulation and licensure by a county under this section shall
20 certify to the county on the relevant application that the applicant has read and understands the
21 employee misclassification notice required under G.S. 143-763(a)(7)."

22 **SECTION 3.4.** G.S. 160A-194 is amended by adding a new subsection to read:

23 "(d) An applicant subject to regulation and licensure by a city under this section shall
24 certify to the city on the relevant application that the applicant has read and understands the
25 employee misclassification notice required under G.S. 143-763(a)(7)."

26 **SECTION 3.5.** G.S. 153A-360 reads as rewritten:

27 **"§ 153A-360. Inspections of work in progress.**

28 (a) As the work pursuant to a permit progresses, local inspectors shall make as many
29 inspections of the work as may be necessary to satisfy them that it is being done according to
30 the provisions of the applicable State and local laws and local ordinances and regulations and
31 of the terms of the permit. In exercising this power, each member of the inspection department
32 has a right, upon presentation of proper credentials, to enter on any premises within the
33 territorial jurisdiction of the department at any reasonable hour for the purposes of inspection or
34 other enforcement action. If a permit has been obtained by an owner exempt from licensure
35 under G.S. 87-1(b)(2), no inspection shall be conducted without the owner being personally
36 present, unless the plans for the building were drawn and sealed by an architect licensed
37 pursuant to Chapter 83A of the General Statutes.

38 (b) Each owner shall certify to the county on the relevant application that the owner has
39 read and understands the employee misclassification notice required under G.S. 143-763(a)(7)."

40 **SECTION 3.6.** G.S. 160A-420 reads as rewritten:

41 **"§ 160A-420. Inspections of work in progress.**

42 (a) As the work pursuant to a permit progresses, local inspectors shall make as many
43 inspections thereof as may be necessary to satisfy them that the work is being done according
44 to the provisions of any applicable State and local laws and of the terms of the permit. In
45 exercising this power, members of the inspection department shall have a right to enter on any
46 premises within the jurisdiction of the department at all reasonable hours for the purposes of
47 inspection or other enforcement action, upon presentation of proper credentials. If a permit has
48 been obtained by an owner exempt from licensure under G.S. 87-1(b)(2), no inspection shall be
49 conducted without the owner being personally present, unless the plans for the building were
50 drawn and sealed by an architect licensed pursuant to Chapter 83A of the General Statutes.

1 (b) Each owner shall certify to the city on the relevant application that the owner has
2 read and understands the employee misclassification notice required under G.S. 143-763(a)(7)."
3

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

6 **SECTION 4.1.** G.S. 96-1 reads as rewritten:

7 **"§ 96-1. Title and definitions.**

8 ...
9 (b) Definitions. – The following definitions apply in this Chapter:

10 ...
11 (12) Employment. – Defined in section 3306 of the Code, with the following
12 additions and exclusions:

13 a. Additions. – The term includes ~~service~~ all of the following:

14 1. Service to a governmental unit, unit.

15 2. Service to a nonprofit organization, or organization.

16 3. Service to an Indian tribe as described in 3306(c)(7) and
17 3306(c)(8) of the Code.

18 4. Service described in section 3306(c)(15)(A) or (B) of the
19 Code involving delivery or distribution of newspapers or
20 shopping news or involving the sale of newspapers or
21 magazines.

22 b. Exclusions. – The term excludes all of the following:

23 1. Service performed by an independent contractor.

24 2. Service performed for a governmental entity or nonprofit
25 organization under 3309(b) and 3309(c) of the Code.

26 3. Service by one or more of the following individuals if the
27 individual is authorized to exercise independent judgment and
28 control over the performance of the work and is compensated
29 solely by way of commission:

30 A. A real estate broker, as defined in G.S. 93A-2.

31 B. A securities salesman, as defined in G.S. 78A-2.

32 "

33 **SECTION 4.2.** G.S. 97-2(2) reads as rewritten:

34 **"§ 97-2. Definitions.**

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

36 ...
37 (2) Employee. – The term "employee" means every person engaged in an
38 employment under any appointment or contract of hire or apprenticeship,
39 express or implied, oral or written, including aliens, and also minors,
40 whether lawfully or unlawfully employed, but excluding persons whose
41 employment is both casual and not in the course of the trade, business,
42 profession, or occupation of his employer, and as relating to those so
43 employed by the State, the term "employee" shall include all officers and
44 employees of the State, including such as are elected by the people, or by the
45 General Assembly, or appointed by the Governor to serve on a per diem,
46 part-time or fee basis, either with or without the confirmation of the Senate;
47 as relating to municipal corporations and political subdivisions of the State,
48 the term "employee" shall include all officers and employees thereof,
49 including such as are elected by the people. The term "employee" shall
50 include members of the North Carolina National Guard while on State active
51 duty under orders of the Governor and members of the North Carolina State

1 Defense Militia while on State active duty under orders of the Governor. The
2 term "employee" shall include deputy sheriffs and all persons acting in the
3 capacity of deputy sheriffs, whether appointed by the sheriff or by the
4 governing body of the county and whether serving on a fee basis or on a
5 salary basis, or whether deputy sheriffs serving upon a full-time basis or a
6 part-time basis, and including deputy sheriffs appointed to serve in an
7 emergency, but as to those so appointed, only during the continuation of the
8 emergency. The sheriff shall furnish to the board of county commissioners a
9 complete list of all deputy sheriffs named or appointed by him immediately
10 after their appointment and notify the board of commissioners of any
11 changes made therein promptly after such changes are made. Any reference
12 to an employee who has been injured shall, when the employee is dead,
13 include also the employee's legal representative, dependents, and other
14 persons to whom compensation may be payable: Provided, further, that any
15 employee, as herein defined, of a municipality, county, or of the State of
16 North Carolina, while engaged in the discharge of the employee's official
17 duty outside the jurisdictional or territorial limits of the municipality, county,
18 or the State of North Carolina and while acting pursuant to authorization or
19 instruction from any superior officer, shall have the same rights under this
20 Article as if such duty or activity were performed within the territorial
21 boundary limits of their employer.

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

25 Any such executive officer of a corporation may, notwithstanding any
26 other provision of this Article, be exempt from the coverage of the
27 corporation's insurance contract by such corporation's specifically excluding
28 such executive officer in such contract of insurance, and the exclusion to
29 remove such executive officer from the coverage shall continue for the
30 period such contract of insurance is in effect, and during such period such
31 executive officers thus exempted from the coverage of the insurance contract
32 shall not be employees of such corporation under this Article.

33 All county agricultural extension service employees who do not receive
34 official federal appointments as employees of the United States Department
35 of Agriculture and who are field faculty members with professional rank as
36 designated in the memorandum of understanding between the North
37 Carolina Agricultural Extension Service, North Carolina State University, A
38 & T State University, and the boards of county commissioners shall be
39 deemed to be employees of the State of North Carolina. All other county
40 agricultural extension service employees paid from State or county funds
41 shall be deemed to be employees of the county board of commissioners in
42 the county in which the employee is employed for purposes of workers'
43 compensation.

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

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

1 Any sole proprietor or partner of a business or any member of a limited
 2 liability company may elect to be included as an employee under the
 3 workers' compensation coverage of such business if he is actively engaged in
 4 the operation of the business and if the insurer is notified of his election to
 5 be so included. Any such sole proprietor or partner or member of a limited
 6 liability company shall, upon such election, be entitled to employee benefits
 7 and be subject to employee responsibilities prescribed in this Article.

8 Employee" shall include an authorized pickup firefighter of the North
 9 Carolina Forest Service of the Department of Agriculture and Consumer
 10 Services when that individual is engaged in emergency fire suppression
 11 activities for the North Carolina Forest Service. As used in this section,
 12 "authorized pickup firefighter" means an individual who has completed
 13 required fire suppression training as a wildland firefighter and who is
 14 available as needed by the North Carolina Forest Service for emergency fire
 15 suppression activities, including immediate dispatch to wildfires and standby
 16 for initial attack on fires during periods of high fire danger.

17 ~~It shall be a rebuttable presumption that the term "employee" shall not~~
 18 ~~include any person performing services in the sale of newspapers or~~
 19 ~~magazines to ultimate consumers under an arrangement whereby the~~
 20 ~~newspapers or magazines are to be sold by that person at a fixed price and~~
 21 ~~the person's compensation is based on the retention of the excess of the fixed~~
 22 ~~price over the amount at which the newspapers or magazines are charged to~~
 23 ~~the person."~~

24
25 **PART V. SEVERABILITY**

26 **SECTION 5.1.** If any section or provision of this act is declared unconstitutional or
27 invalid by the courts, it does not affect the validity of this act as a whole or any part other than
28 the part so declared to be unconstitutional or invalid.

29
30 **PART VI. EFFECTIVE DATE**

31 **SECTION 6.1.** This act becomes effective July 1, 2015.