**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, SO AS TO ENACT THE “FRAUDULENT MISCLASSIFICATION OF WORKERS PROTECTION ACT” BY ADDING CHAPTER 5 TO TITLE 41 TO PROHIBIT THE FRAUDULENT MISCLASSIFICATION OF WORKERS; TO CREATE A RELATED PRIVATE CAUSE OF ACTION; TO PROHIBIT RETALIATORY CONDUCT BY AN EMPLOYER; TO PROVIDE RELATED PENALTIES AND REMEDIES; TO PROHIBIT THE CONTRAVENTION OF WAIVER OF THE PROVISIONS OF THIS ACT BY PRIVATE AGREEMENT; TO IMPOSE CERTAIN RECORD KEEPING REQUIREMENTS; AND TO CREATE A NONLAPSING FUND COMPRISED OF CIVIL PENALTIES COLLECTED FOR VIOLATIONS FOR USE BY THE DEPARTMENT OF LABOR, LICENSING AND REGULATION TO PARTIALLY OFFSET THE ADMINISTRATION, INVESTIGATION, AND OTHER EXPENSES INCURRED BY THE DEPARTMENT IN IMPLEMENTING THIS CHAPTER.

Whereas, the fraudulent misclassification of employees as something other than employees, such as independent contractors, presents a serious problem for affected employees, employers, and to the entire economy; and

Whereas, misclassified employees are often denied access to critical benefits and protections to which they are entitled or face diminished benefits, including family and medical leave, overtime, minimum wage, unemployment insurance, and Social Security; and

Whereas, employee misclassification also generates substantial losses in State and federal tax revenue, the Social Security and Medicare funds, and to state unemployment insurance and workers compensation funds. Now therefore,

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Title 41 of the 1976 Code is amended by adding:

“CHAPTER 5

Fraudulent Misclassification of Workers

Section 41‑5‑110. This act must be known and may be cited as the ‘Fraudulent Misclassification of Workers Protection Act’.

Section 41‑5‑120. The purpose of this chapter is to prohibit the fraudulent misclassification of workers, to create a related private cause of action, and to prohibit retaliatory conduct by an employer.

Section 41‑5‑130. This chapter applies to all public employers and private employers in South Carolina.

Section 41‑5‑140. (A) An employer may not improperly classify an individual who performs services for remuneration paid by an employer as an independent contractor.

(B) An employer has improperly classified an individual when an employer‑employee relationship exists but the employer has not classified the individual as an employee.

(C) An employer‑employee relationship must be presumed to exist when work is performed by an individual for remuneration paid by an employer, unless to the satisfaction of the Department of Labor, Licensing and Regulation, the employer demonstrates that:

(1) the individual is an exempt person; or

(2)(a) the individual who performs the work is free from control and direction over the performance of services, subject only to the right of the person or entity for whom services are provided to specify the desired result;

(b) the individual is customarily engaged in an independently established trade, occupation, profession, or business; and

(c) the work is outside of the usual course of business of the employer for whom the work is performed.

Section 41‑5‑150. (A) An employer who violates or fails to comply with the requirements of this chapter must be subject to a civil penalty of not less than one thousand dollars and not more than five thousand dollars for each violation. Each employee who is not properly classified in violation of this chapter must be considered a separate violation.

(B) An employer who violates Section 41‑5‑180 must be subject to a civil penalty of not less than five thousand dollars and not more than ten thousand dollars for each such violation.

(C) In addition to the penalties provided in subsections (A) and (B), an employer may be subject to a stop work order, and may be ordered to make restitution, pay any interest due, and otherwise comply with all applicable laws and regulations.

(D) Within thirty days after the final order, an employer found in violation of this chapter must be required to:

(1) pay restitution to or on behalf of any individual not properly classified; and

(2) otherwise come into compliance with all applicable labor laws, including those related to income tax withholding, unemployment insurance, wage and hour laws, and workers’ compensation.

(E) Notwithstanding subsections (A) and (B), an employer who has been found to have violated this chapter more than twice in a two‑year period:

(1) shall have the choice of being assessed an administrative penalty of twenty thousand dollars for each employee that was not properly classified, or be debarred for five years; and

(2) if an employer is debarred pursuant to item (1), the employer must be subject to a civil penalty of not less than five thousand dollars and not more than ten thousand dollars for each employee that was not properly classified, and may be ordered to make restitution, pay any interest due, and otherwise comply with all applicable laws and regulations.

(F) A penalty issued under this section against an employer must be in effect against any successor corporation or business entity that:

(1) has one or more of the same principals or officers as the employer against whom the penalty was assessed; and

(2) is engaged in the same or equivalent trade or activity.

Section 41‑5‑160. No provision of this chapter may be contravened, waived, or set aside by private agreement. An agreement between an employer and employee in which the employee, despite not being an exempt person, agrees to be classified as an independent contractor may not be a defense to an action to recover unpaid wages or liquidated damages.

Section 41‑5‑170. (A) A person aggrieved by a violation of this chapter may bring a civil action in a court of competent jurisdiction within three years after the occurrence of the alleged violation. A person whose rights have been violated under this chapter by an employer or entity is entitled to collect:

(1) the amount of any wages, salary, employment benefits, or other compensation denied or lost to the person by reason of the violation, plus an additional equal amount in liquidated damages;

(2) compensatory damages and an amount up to five hundred dollars for each violation of this chapter; and

(3) in the case of unlawful retaliation, all legal or equitable relief as may be appropriate.

(B) A court may order any combination of:

(1) reinstatement and the payment of back wages;

(2) fringe benefits;

(3) seniority rights; and

(4) treble damages for lost wages or benefits.

(C) The court shall award reasonable attorneys’ fees and costs of the action incurred to be paid by the defendant.

Section 41‑5‑180. (A) An employer may not discriminate in any manner or take adverse action against any person because the person:

(1) makes an oral or written complaint with the employer or the department alleging that the employer violated any provision of this chapter;

(2) brings an action or initiates a proceeding involving a violation of this chapter;

(3) testifies in an action authorized pursuant to this chapter or a proceeding involving a violation of the provisions of this chapter; or

(4) assists in an investigation by providing information to a litigant in a civil action, the department, or another agency in proceedings as provided by this chapter.

(B)(1) A person who believes that an employer has discriminated in any manner or taken adverse action against the person in violation of this chapter may submit to the department a written complaint, signed by the complainant, that alleges the discrimination.

(2) Upon receipt of a complaint, the department shall conduct an investigation.

Section 41‑5‑190. (A) For a period of three years, an employer shall maintain records of:

(1) the name, address, occupation, and classification of each employee, exempt person, or independent contractor;

(2) the rate of pay of each employee or method of payment for the independent contractor or exempt person;

(3) the classification of each individual as an employee, exempt person, or an independent contractor;

(4) the amount that is paid each pay period to each employee, exempt person, or independent contractor;

(5) the hours that each employee, exempt person, or independent contractor works each day and each work week;

(6) for all individuals who are not classified as employees, evidence that each individual is an exempt person or an independent contractor or an employee of the independent contractor; and

(7) other information that the department considers necessary to enforce this chapter.

(B)(1) An employer shall provide each individual classified as an independent contractor or exempt person with written notice of such classification at the time the individual is hired. This written notice must include:

(a) an explanation of the implications of the individual’s classification as an independent contractor or exempt person rather than as an employee, and

(b) contact information for the department.

(2) Failure to provide notice required by this subsection must be construed as evidence of a knowing violation. The employer must be liable for an administrative penalty of five hundred dollars for each individual that the employer failed to notify.

Section 41‑5‑200. There is established as a nonlapsing fund named the Workplace Fraud Fund. Each civil penalty collected pursuant to this chapter must be paid into the fund to partially offset the administration, investigation, and other expenses incurred by the department in implementing this chapter. All funds deposited into the fund, and any interest earned on those funds, may not be remitted to or revert to the general fund of the State, but instead must be retained by the department and continually available for its use only in the administration of this chapter without regard to fiscal year limitation.”

SECTION 2. This act takes effect upon approval by the Governor.

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