

AN ACT relating to misclassification of employees in the construction industry.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔SECTION 1. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

(1) The General Assembly finds and declares that:

(a) Kentucky's construction industry is experiencing dangerous levels of employee misclassification fraud. Unscrupulous employers are intentionally reporting employees as independent contractors to state and federal authorities or workers' compensation carriers in record numbers. In addition, there has been an explosion of employers who operate in the underground economy and fail to report all or a sizable portion of their workers;

(b) A recent study of Kentucky's unemployment insurance audits for the years 2007-2010 found that on average, twenty-six and four-tenths percent (26.4%) of audited construction employers had misclassified workers as independent contractors. The audit results show that misclassification is a growing problem in Kentucky;

(c) Construction industry fraud reduces government revenue, shifts tax and workers' compensation insurance costs to law-abiding employers, lowers working conditions, and steals jobs from legitimate employers and their employees. Misclassification has a negative financial impact on individual workers, Kentucky state government, and the private sector in Kentucky;

(d) Testimony presented to the Kentucky General Assembly in 2014 estimated that construction employers who misclassify employees as independent contractors could reduce payroll costs by approximately thirty percent (30%), thereby creating a significant unfair competitive advantage over construction employers who abide by the law;

(e) It is estimated that the unemployment insurance system lost an average of one million seven hundred fifty thousand dollars (\$1,750,000) each year in the construction sector for the period 2007-2010 in unemployment insurance taxes that were not levied as a result of misclassification; and

(f) Based on Internal Revenue Service estimates that thirty percent (30%) of the income of misclassified workers in Kentucky is not reported, it is estimated that six million one hundred thirty thousand dollars (\$6,130,000) annually of state income tax revenues from the construction sector were lost in Kentucky for the period 2007-2010 as a result of employee misclassification.

(2) Therefore, the General Assembly finds it necessary to enact legislation similar to legislation that has been enacted in several states to address the problem of misclassification of employees in the construction industry.

➔SECTION 2. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

As used in Sections 1 to 10, 11, and 12 of this Act, unless the context otherwise requires:

(1) "Agent of the contractor" means a person having management authority or enforcement powers with respect to a practice or policy of the contractor regarding the classification of an employee, a corporate officer, or a member of the board of directors of the contractor;

(2) "Commissioner" means the commissioner of the Department of Workplace Standards;

(3) "Construction" means constructing, reconstructing, altering, maintaining, moving, rehabilitating, repairing, renovating, or demolishing any building, structure, or improvement, or activities relating to the excavation of or other development or improvement to land;

- (4) "Contractor" means any sole proprietor, partnership, firm, corporation, limited liability company, association, or other legal entity permitted by law to do business within the Commonwealth of Kentucky who engages in construction. "Contractor" includes a general contractor, a subcontractor, and a lower-tiered contractor;
- (5) "Department" means the Department of Workplace Standards in the Kentucky Labor Cabinet;
- (6) "Division" means the Division of Employment Standards, Apprenticeship and Mediation in the Department of Workplace Standards;
- (7) "Employer" means any contractor that employs individuals deemed employees under subsection (2) of Section 3 of this Act; and
- (8) "Performing services" means the performance of construction.

➔SECTION 3. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

- (1) Misclassification of an employee as an independent contractor is a violation of this section, and a contractor that violates this section shall be assessed a civil penalty under Section 11 of this Act.
- (2) A person performing services for a contractor is presumed to be an employee of the contractor and not an independent contractor unless the person is a separate business entity and meets all the following criteria:
- (a) The person is performing the services free from the direction or control over the means and manner of providing the service, subject only to the right of the contractor, for whom the service is provided, to specify the desired result;
- (b) The person has the right to perform similar services and make those services available to the general public or the business community on a continuing basis;

- (c) The person hires, if necessary, its own employees without contractor approval, pays the employees without reimbursement from the contractor, and reports the employees' income to the Internal Revenue Service;
- (d) The person has an investment of capital beyond ordinary tools and equipment and a personal vehicle, and furnishes the tools and equipment necessary to perform the services;
- (e) The person includes services rendered on a federal income tax schedule as an independent business or profession;
- (f) The person gains the profits and bears the losses of the business; and
- (g) The person performs the services for the contractor under a business entity's name, and the contractor does not represent the business entity as an employee of the contractor to its customers.
- (3) The failure to withhold federal or state income taxes or to pay unemployment compensation contributions or workers' compensation premiums with respect to an individual's wages shall not be considered in making a determination under this section, except as set forth in subsection (2) of this section.
- (4) An individual's act of securing workers' compensation insurance with a carrier as a sole proprietor, partnership, or otherwise shall not be binding on any determination under this section.
- (5) When a business entity meets the definition of a separate business entity pursuant to this section, the separate business entity shall be considered a contractor subject to Sections 1 to 10 of this Act in regard to the classification of individuals performing services for it.

➔SECTION 4. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

- (1) Any person aggrieved by a contractor, or an agent of the contractor, for violations of Section 3, 5, or 7 of this Act, or any person who has a reasonable

belief, based on good faith and without malicious intent, that the contractor or the agent of the contractor is in violation of or has violated Section 3 or 5 of this Act, may file a complaint with the division.

(2) (a) The division shall conduct an investigation to ascertain the facts relating to an alleged violation. The investigation may be made by written or oral inquiry, field visit, conference, or any method or combination of methods the division deems appropriate.

(b) If the commissioner determines that a contractor has violated a provision of Section 3, 5, or 7 of this Act, the commissioner may:

1. Issue and cause to be served an order to cease and desist from further violation;

2. Initiate actions to collect the amount of any wages, salary, employment benefits, or other compensation denied or lost to any person adversely affected by the violation;

3. In the case of unlawful retaliation, initiate actions to provide all legal or equitable relief as appropriate;

4. Assess civil penalties provided in Section 11 of this Act; and

5. Take affirmative or other action as deemed reasonable to eliminate the effect of a violation pursuant to the authority granted in KRS Chapters 336 and 337.

(3) All orders or decisions of the commissioner may be appealed, and upon appeal, an administrative hearing shall be conducted in accordance with KRS Chapter 13B.

➔SECTION 5. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

(1) A contractor or any agent of any contractor shall not retaliate through discharge or in any other manner against any person with regard to the terms or conditions

of his or her employment for taking any of the following actions permitted under Sections 1 to 10 of this Act:

- (a) Making or threatening to make a complaint to a contractor, a coworker, or a state or federal agency that rights guaranteed under Sections 1 to 10 of this Act have been violated;
- (b) Causing to be instituted any proceeding under Section 4 or 6 of this Act; or
- (c) Providing information to or testifying before any public body conducting an investigation, hearing, or inquiry into any violation of a law, rule, or administrative regulation by such employer.

(2) Any act of retaliation under this section shall subject a contractor to the civil penalties under Section 11 of this Act.

➔SECTION 6. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

In lieu of the administrative remedy provided in Section 4 of this Act, any person aggrieved by a contractor for a violation of Section 3 or 5 of this Act may file a civil action in Circuit Court in the county where the alleged violation occurred or where the aggrieved person resides. The court, in rendering a judgment in the civil action, may order:

- (1) Restitution of any wages or other compensation denied or lost to the aggrieved person;
- (2) In the case of unlawful retaliation, all legal or equitable relief as the court deems appropriate; and
- (3) Reasonable attorney's fees and costs.

➔SECTION 7. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

- (1) (a) Each contractor shall post in a prominent and accessible place on the site where the construction is performed a legible statement, provided by the

commissioner, that describes the:

1. Responsibility of independent contractors to pay taxes required by state and federal law;
2. Rights of employees to workers' compensation, unemployment benefits, minimum wage, overtime, and other federal and state workplace protections;
3. Protections against retaliation in Section 5 of this Act; and
4. Penalties in Section 11 of this Act if the contractor fails to properly classify an individual as an employee.

(b) The notice shall also contain contact information for individuals to file complaints or inquire with the commissioner about employment classification status.

(c) This information shall be provided in English, Spanish, and other languages required by the commissioner.

(d) The posted statement shall be constructed of materials capable of withstanding adverse weather conditions.

(2) Within thirty (30) days of the effective date of this Act, the commissioner shall create the notice described in this section and post the notice on the cabinet's Web site for downloading by contractors.

➔SECTION 8. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

The commissioner shall promulgate administrative regulations as deemed necessary to implement and administer Sections 1 to 10 of this Act.

➔SECTION 9. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

Upon the issuance of an order, decision, or determination that a contractor has misclassified employees as independent contractors, the commissioner shall provide a

copy of the order, decision, or determination to the commissioner of the Department of Revenue, the commissioner of the Department of Workers' Claims, and the Office of Employment and Training, Division of Unemployment Insurance, no later than sixty (60) days after the issuance of the order, decision, or determination. Information provided to agencies shall be confidential and shall not be published or open to public inspection.

➔SECTION 10. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO READ AS FOLLOWS:

Sections 1 to 10 of this Act shall not be interpreted or construed to alter, supersede, or repeal other provisions of the Kentucky Revised Statutes, including those relating to wages and hours, occupational safety and health, workers' compensation, and unemployment insurance, but shall be held to be ancillary and supplemental thereto.

➔Section 11. KRS 337.990 is amended to read as follows:

The following civil penalties shall be imposed, in accordance with the provisions in KRS 336.985, for violations of the provisions of this chapter:

- (1) Any firm, individual, partnership, or corporation that violates KRS 337.020 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each offense. Each failure to pay an employee the wages when due him under KRS 337.020 shall constitute a separate offense.
- (2) Any employer who violates KRS 337.050 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).
- (3) Any employer who violates KRS 337.055 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each offense and shall make full payment to the employee by reason of the violation. Each failure to pay an employee the wages as required by KRS 337.055 shall constitute a separate offense.
- (4) Any employer who violates KRS 337.060 shall be assessed a civil penalty of not

less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) and shall also be liable to the affected employee for the amount withheld, plus interest at the rate of ten percent (10%) per annum.

- (5) Any employer who violates the provisions of KRS 337.065 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each offense and shall make full payment to the employee by reason of the violation.
- (6) Any person who fails to comply with KRS 337.070 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each offense and each day that the failure continues shall be deemed a separate offense.
- (7) Any employer who violates any provision of KRS 337.275 to 337.325, KRS 337.345, ~~and~~ KRS 337.385 to 337.405, and subsection (2) of Section 7 of this Act, or willfully hinders or delays the commissioner or the commissioner's authorized representative in the performance of his or her duties under KRS 337.295, or fails to keep and preserve any records as required under KRS 337.320 and 337.325, or falsifies any record, or refuses to make any record or transcription thereof accessible to the commissioner or the commissioner's authorized representative shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000). A civil penalty of not less than one thousand dollars (\$1,000) shall be assessed for any subsequent violation of KRS 337.285(4) to (9) and each day the employer violates KRS 337.285(4) to (9) shall constitute a separate offense and penalty.
- (8) Any employer who pays or agrees to pay wages at a rate less than the rate applicable under KRS 337.275 and 337.285, or any wage order issued pursuant thereto shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).

- (9) Any employer who discharges or in any other manner discriminates against any employee because the employee has made any complaint to his or her employer, to the commissioner, or to the commissioner's authorized representative that he or she has not been paid wages in accordance with KRS 337.275 and 337.285 or regulations issued thereunder, or because the employee has caused to be instituted or is about to cause to be instituted any proceeding under or related to KRS 337.385, or because the employee has testified or is about to testify in any such proceeding, shall be deemed in violation of KRS 337.275 to 337.325, KRS 337.345, and KRS 337.385 to 337.405 and shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).
- (10) Any employer who violates KRS 337.365 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).
- (11) Any person who violates KRS 337.530 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000).
- (12) Any contractor or subcontractor who violates any wage or work hours provision in any contract under KRS 337.505 to 337.550 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each offense, and the contractor or subcontractor shall make full restitution to all employees to whom he or she is legally indebted by reason of said violation. The prime contractor shall be jointly and severally liable with a subcontractor for wages due an employee of the subcontractor. For a flagrant or repeated violation the offending contractor or subcontractor shall be barred from bidding on, or working on, any and all public works contracts, either in his or her name or in the name of any other company, firm, or other entity in which he or she might be interested for a period of two (2) years from the date of the last offense. Each day of violation shall constitute a separate offense, and the violation as affects each individual worker shall constitute a separate offense.

- (13) Any public authority, public official, or member of a public authority who willfully fails to comply or to require compliance with KRS 337.505 to 337.550 shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each offense. Each day of violation shall constitute a separate offense. If a public authority, public official or member of a public authority willfully or negligently fails to comply with KRS 337.505 to 337.550 and the failure results in damages, injury or loss to any person, the public authority, public official, or member of a public authority may be held liable in a civil action.
- (14) A person shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) when that person discharges or in any other manner discriminates against an employee because the employee has:
- (a) Made any complaint to his or her employer, the commissioner, or any other person; or
 - (b) Instituted, or caused to be instituted, any proceeding under or related to KRS 337.420 to 337.433; or
 - (c) Testified, or is about to testify, in any such proceedings.
- (15) (a) Upon a final determination of a violation of Section 3 of this Act, the contractor shall be assessed a civil penalty not to exceed one thousand dollars (\$1,000) for the first violation. A contractor shall be assessed a civil penalty not to exceed five thousand dollars (\$5,000) for each subsequent final determination of a violation within a five (5) year period.**
- (b) 1. Any contractor who willfully violates Section 3 of this Act, or obstructs the commissioner, his authorized representative, or any other person authorized to inspect places of employment, shall be liable for civil penalties up to double the amount provided in paragraph (a) of this subsection.**

2. The increased civil penalty shall be imposed in cases in which a contractor's conduct is proven by a preponderance of the evidence to be willful.

3. For the purposes of this paragraph, the term "willfully violates" means a contractor knew or should have known that his or her conduct was prohibited.

(c) The civil penalties imposed in this subsection shall be in addition to any other penalties provided or recovered under other provisions of the Kentucky Revised Statutes or federal law.

(16) A contractor shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for a violation of Section 5 of this Act.

(17) A contractor that is a corporation, any officer of the corporation, or any shareholder who owns or controls at least ten percent (10%) of the outstanding stock of the corporation who knowingly permits the corporation to willfully violate Sections 1 to 10 of this Act shall also be in violation of and subject to the civil penalties issued in the commissioner's order, decision, or determination.

(18) Any penalties imposed under this section by the commissioner may be appealed, and upon appeal, an administrative hearing shall be conducted in accordance with KRS Chapter 13B.

➔Section 12. KRS 45A.485 is amended to read as follows:

(1) Any state contract awarded under KRS Chapter 45A, 175, 176, 177, or 180 after July 15, 1994, shall require the contractor and all subcontractors performing work under the contract to:

(a) Reveal any final determination of a violation by their respective company within the previous five (5) year period pursuant to KRS Chapters 136, 139, 141, 337, 338, 341, and 342 that apply to the contractor or subcontractor; and

- (b) Be in continuous compliance with the provisions of KRS Chapters 136, 139, 141, 337, 338, 341, and 342 that apply to the contractor or subcontractor for the duration of the contract.
- (2) A contractor's failure to reveal a final determination of a violation by the contractor of KRS Chapters 136, 139, 141, 337, 338, 341, and 342 or to comply with these statutes for the duration of the contract shall be grounds for the Commonwealth's:
 - (a) Cancellation of the contract; and
 - (b) Disqualification of the contractor from eligibility for future state contracts for a period of two (2) years.
 - (3) A subcontractor's failure to reveal a final determination of a violation by the subcontractor of KRS Chapters 136, 139, 141, 337, 338, 341, and 342 or to comply with these statutes for the duration of the contract shall be grounds for the Commonwealth's disqualification of the subcontractor from eligibility for future state contracts for a period of two (2) years.

(4) Notwithstanding subsections (1), (2), and (3) of this section, any contractor or any corporate officer or shareholder who owns or controls at least ten percent (10%) of the outstanding stock of the corporation that has two (2) or more final determinations of violations of Sections 1 to 10 of this Act within a five (5) year period, shall not be awarded a contract under this chapter or KRS Chapters 175, 176, 177, or 180 for a period of two (2) years from the date of the last final determination of a violation.

➔Section 13. KRS 131.190 is amended to read as follows:

- (1) (a) No present or former commissioner or employee of the Department of Revenue, present or former member of a county board of assessment appeals, present or former property valuation administrator or employee, present or former secretary or employee of the Finance and Administration Cabinet, former secretary or employee of the Revenue Cabinet, or any other person,

shall intentionally and without authorization inspect or divulge any information acquired by him of the affairs of any person, or information regarding the tax schedules, returns, or reports required to be filed with the department or other proper officer, or any information produced by a hearing or investigation, insofar as the information may have to do with the affairs of the person's business.

(b) The prohibition established by paragraph (a) of this subsection does not extend to:

1. Information required in prosecutions for making false reports or returns of property for taxation, or any other infraction of the tax laws;
2. Any matter properly entered upon any assessment record, or in any way made a matter of public record;
3. Furnishing any taxpayer or his properly authorized agent with information respecting his own return;
4. Testimony provided by the commissioner or any employee of the Department of Revenue in any court, or the introduction as evidence of returns or reports filed with the department, in an action for violation of state or federal tax laws or in any action challenging state or federal tax laws;
5. Providing an owner of unmined coal, oil or gas reserves, and other mineral or energy resources assessed under KRS 132.820(1), or owners of surface land under which the unmined minerals lie, factual information about the owner's property derived from third-party returns filed for that owner's property, under the provisions of KRS 132.820(2), that is used to determine the owner's assessment. This information shall be provided to the owner on a confidential basis, and the owner shall be subject to the penalties provided in KRS 131.990(2). The third-party

filer shall be given prior notice of any disclosure of information to the owner that was provided by the third-party filer;

6. Providing to a third-party purchaser pursuant to an order entered in a foreclosure action filed in a court of competent jurisdiction, factual information related to the owner or lessee of coal, oil, gas reserves, or any other mineral resources assessed under KRS 132.820(1). The department may promulgate an administrative regulation establishing a fee schedule for the provision of the information described in this subparagraph. Any fee imposed shall not exceed the greater of the actual cost of providing the information or ten dollars (\$10); or
 7. Providing information to a licensing agency, the Transportation Cabinet, or the Kentucky Supreme Court under KRS 131.1817.
- (2) The commissioner shall make available any information for official use only and on a confidential basis to the proper officer, agency, board or commission of this state, any Kentucky county, any Kentucky city, any other state, or the federal government, under reciprocal agreements whereby the department shall receive similar or useful information in return.
 - (3) Statistics of tax-paid gasoline gallonage reported monthly to the Department of Revenue under the gasoline excise tax law may be made public by the department.
 - (4) Access to and inspection of information received from the Internal Revenue Service is for Department of Revenue use only, and is restricted to tax administration purposes. Notwithstanding the provisions of this section to the contrary, information received from the Internal Revenue Service shall not be made available to any other agency of state government, or any county, city, or other state, and shall not be inspected intentionally and without authorization by any present secretary or employee of the Finance and Administration Cabinet, commissioner or employee of the Department of Revenue, or any other person.

- (5) Statistics of crude oil as reported to the Department of Revenue under the crude oil excise tax requirements of KRS Chapter 137 and statistics of natural gas production as reported to the Department of Revenue under the natural resources severance tax requirements of KRS Chapter 143A may be made public by the department by release to the Energy and Environment Cabinet, Department for Natural Resources.
- (6) Notwithstanding any provision of law to the contrary, beginning with mine-map submissions for the 1989 tax year, the department may make public or divulge only those portions of mine maps submitted by taxpayers to the department pursuant to KRS Chapter 132 for ad valorem tax purposes that depict the boundaries of mined-out parcel areas. These electronic maps shall not be relied upon to determine actual boundaries of mined-out parcel areas. Property boundaries contained in mine maps required under KRS Chapters 350 and 352 shall not be construed to constitute land surveying or boundary surveys as defined by KRS 322.010 and any administrative regulations promulgated thereto.
- (7) Notwithstanding any other provision of the Kentucky Revised Statutes, the department may divulge to the applicable school districts on a confidential basis any utility gross receipts license tax return information that is necessary to administer the provisions of KRS 160.613 to 160.617.
- (8) Notwithstanding any other provision of the Kentucky Revised Statutes, the department shall provide a copy of any assessment for failure to pay business, corporate, or personal income tax by an employer in the construction industry arising out of the misclassification of an employee, on a confidential basis, to the commissioner of the Department of Workplace Standards, the commissioner of the Department of Workers' Claims, and the Office of Employment and Training, Division of Unemployment Insurance no later than sixty (60) days after the issuance of the assessment.**

➔SECTION 14. A NEW SECTION OF KRS CHAPTER 341 IS CREATED TO

READ AS FOLLOWS:

Pursuant to KRS 341.190(3), the Office of Employment and Training, Division of Unemployment Insurance shall provide a copy of any assessment for failure to pay unemployment insurance taxes by an employer in the construction industry arising out of the misclassification of an employee to the commissioner of the Department of Workplace Standards, the commissioner of the Department of Workers' Claims, and the commissioner of the Department of Revenue no later than sixty (60) days after the issuance of the assessment.

→SECTION 15. A NEW SECTION OF KRS CHAPTER 342 IS CREATED TO READ AS FOLLOWS:

Notwithstanding any confidentiality provisions contained in this chapter, the commissioner of the Department of Workers' Claims shall provide a copy of any order relating to the misclassification of an employee, the intentional and material underpayment or concealment of payroll, or the failure to secure workers' compensation in the construction industry to the commissioner, the commissioner of the Department of Revenue, and the Office of Employment and Training, Division of Unemployment Insurance no later than sixty (60) days after the issuance of the order.