



Ohio Legislative Service Commission

Bill Analysis

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H.B. 355

131st General Assembly
(As Introduced)

Reps. Retherford, Maag, Young, Blessing, Henne, Cera, S. O'Brien

BILL SUMMARY

- Requires the Administrator of Workers' Compensation to adopt rules, consistent with the common law rules used by the Internal Revenue Service, to establish a test for determining who is an "employee" for purposes of the Workers' Compensation Law, the Unemployment Compensation Law, and the Income Tax Law.
- Prohibits an employer from negligently failing to consider an individual who is an employee under the rules adopted by the Administrator under the bill to be an employee for purposes of those laws.
- Creates civil penalties for an employer who violates the bill's employee misclassification prohibition and criminal penalties if the employer violates the prohibition again within a five-year period.
- Requires the Administrator to administer and enforce the bill's provisions.
- Requires the Administrator to issue a stop work order, requiring cessation of all business operations, against an employer if, after an investigation, the Administrator determines that reasonable evidence exists that the employer violated the employee misclassification prohibition.
- Creates civil penalties for an employer who violates a stop work order.
- Makes a determination by the Administrator that an employer has misclassified an employee as an independent contractor binding on the Director of Job and Family Services and the Tax Commissioner unless the individual is otherwise not considered an employee under the applicable law.

- Creates the Employee Classification Fund, and requires the Administrator to use the Fund to administer and enforce the bill.

CONTENT AND OPERATION

Definition of "employee"

Currently, the Workers' Compensation Law, the Unemployment Compensation Law, and the Income Tax Law have a different or no definition of "employee" for purposes of the law and have different tests to determine whether an individual performing services for another is covered by that law (all of the tests generally examine who directs and controls the services performed to determine employee status). The bill requires the Administrator of Workers' Compensation to adopt rules, consistent with the common law rules for determining an employer-employee relationship used by the Internal Revenue Service (IRS), to establish a test for determining whether an individual is an employee or independent contractor for purposes of those laws.¹

IRS test

The IRS uses what is known as the "common law test" to determine independent contractor status (this test was formerly known as the 20-factor test, but the IRS consolidated some of the factors). This 11-factor test is used for federal income tax and federal unemployment tax purposes.² The test is divided into three categories: behavioral control, financial control, and the type of relationship of the parties.

Behavioral control – this category determines whether the business has a right to direct and control how a worker does the task for which the worker is hired. Two factors are included in this category:

(1) Instructions that the business gives to the worker – an employee is generally subject to the business' instructions about when, where, and how to work.

(2) Training that the business gives to the worker – an employee may be trained to perform services in a particular manner, while an independent contractor ordinarily uses the contractor's own methods.

¹ R.C. 4175.01.

² See U.S. Department of Labor, Conformity Requirements for State UC Laws, http://workforcesecurity.doleta.gov/unemploy/pdf/uilaws_coverage.pdf (November 1, 2015).



Financial control – this category determines whether the business has a right to control the business aspects of the worker's job. This category contains the following five factors:

(1) The extent to which the worker has unreimbursed business expenses – an independent contractor is more likely to have unreimbursed expenses.

(2) The extent of the worker's investment – an independent contractor often invests in the contractor's own equipment, facilities, and tools to perform the services, rather than that equipment, facility, or tools being provided by the employer.

(3) The extent to which the worker makes the worker's services available to the relevant market – an independent contractor is free to seek out further business opportunities.

(4) How the business pays the worker – an independent contractor is generally paid a flat fee for the contractor's services, while an employee is paid a set wage over a period of time (i.e., hourly, monthly, annually).

(5) The extent to which the worker can realize a profit or loss – an independent contractor can make a profit or loss.

Type of relationship between the worker and employer – this category consists of the following four factors:

(1) A written contract exists describing the relationship the parties intend to create.

(2) Whether the business provides the worker with employee-type benefits such as insurance, a pension plan, vacation pay, or sick pay.

(3) Whether the relationship is permanent.

(4) The extent to which services performed by the worker are a key aspect of the company's regular business.³

Current law tests

Currently, the following tests are used to determine whether an individual is an employee or independent contractor for purposes of the following laws:

³ U.S. Internal Revenue Service, Publication 15-A (2015) Employer's Supplemental Tax Guide, www.irs.gov/pub/irs-pdf/p15a.pdf (November 1, 2015).

(1) For the Income Tax Law and the Unemployment Compensation Law, variations of the common law test;⁴

(2) For the Workers' Compensation Law, whether the employer reserves the right to control the means and manner of doing the work.⁵

All of the tests used largely base the determination of independent contractor status on how much direction and control the "employer" has over the individual performing the services.

Changes to the definition of "employee" under specified labor laws

Unemployment Compensation Law

Under the bill, for purposes of the Unemployment Compensation Law, "employee" has the same meaning as described above, unless the services performed by the individual do not constitute "employment" as defined in the Unemployment Compensation Law.⁶ "Employee" is not currently statutorily defined for purposes of the Unemployment Compensation Law. The Unemployment Compensation Law, however, does define "employment" for purposes of that law. Continuing law generally defines "employment" as service performed by an individual for remuneration under any contract of hire including service performed by a corporate officer, without regard to whether the service is executive, managerial, or manual in nature, and without regard to whether the officer is a stockholder or a member of the board of directors of the corporation, unless it is shown to the satisfaction of the Director of Job and Family Services (the JFS Director administers the Unemployment Compensation Law) that the individual has been and will continue to be free from direction or control over the performance of the service, both under a contract of service and in fact. The bill removes a provision that requires the JFS Director to adopt rules to define "direction or control" and instead requires the JFS Director to base any determination that an individual is free from direction or control upon a determination made by the Administrator pursuant to the bill.⁷

⁴ See U.S. Department of Labor, Conformity Requirements for State UC Laws, http://workforsecurity.doleta.gov/unemploy/pdf/uilaws_coverage.pdf (accessed November 1, 2015); Ohio Department of Taxation, Frequently Asked Questions, <http://www.tax.ohio.gov/faq.aspx> (accessed November 1, 2015); R.C. 4141.01; and Ohio Administrative Code 4141-3-05.

⁵ *Gillum v. Industrial Comm.*, 141 Ohio St. 373, 374 (1943). See also *Bostic v. Connor*, 37 Ohio St.3d 144 (1988).

⁶ R.C. 4141.01(EE).

⁷ R.C. 4141.01(B)(1).



Under continuing law, the Unemployment Compensation Law lists specific services that are included and excluded in the definition of "employment." The bill removes the current law test to determine whether construction services provided by an individual are considered employment, under which the services are employment if ten out of 20 criteria are satisfied.⁸

Workers' Compensation Law

Ohio's Workers' Compensation Law covers most employees in the public and private sector. Volunteer police officers and firefighters are currently covered (generally volunteers are not covered), and off-duty police, fire, and first responders are covered under certain circumstances. The bill largely replaces the definition of employee under the Workers' Compensation Law with the bill's definition but maintains coverage for the off-duty police, fire, and other first responders. However, because the bill requires factors related to financial control in the test for whether an individual is an employee, it appears that the bill removes coverage for volunteer police officers and firefighters.⁹ Under continuing law, the state or a political subdivision may contract with the Bureau of Workers' Compensation for coverage of volunteer police officers and firefighters who would not otherwise be covered.¹⁰

The bill retains the current law exceptions to the definition of "employee." However, because of the bill's new definition of "employee," it is unclear whether the continuing law exceptions are necessary to exclude certain individuals from the definition of "employee" for workers' compensation purposes, such as an individual incorporated as a corporation. But by retaining the exceptions, the bill retains the ability of such an individual to elect to obtain coverage under the Workers' Compensation Law if the individual is otherwise able to do so.

Similar to the Unemployment Compensation Law, the bill also eliminates the current law requirement that every individual who performs labor or provides services pursuant to a construction contract is an "employee" if at least ten of 20 specified criteria apply.¹¹

⁸ R.C. 4141.01(B)(2)(k).

⁹ R.C. 4121.01 and 4123.01(A), with conforming changes in R.C. 1349.61 and 4123.026.

¹⁰ R.C. 4123.03, not in the bill.

¹¹ R.C. 4123.01(A).

Income Tax Law

"Employee" is not currently statutorily defined for purposes of the Income Tax Law. The Income Tax Law currently follows the IRS test.¹² The bill specifies that "employee" means an individual who is an employee under the rules adopted by the Administrator pursuant to the bill.¹³

Prohibition regarding misclassifying employees

The bill prohibits an employer from negligently failing to consider an individual who is an employee under the rules adopted by the Administrator to be an employee for purposes of the Workers' Compensation Law, the Unemployment Compensation Law, and the Income Tax Law.¹⁴

An employer who violates the prohibition is subject to civil penalties from the Administrator (see "**Disciplinary actions**," below). For any subsequent violation of the prohibition within five years after the date the employer previously was assessed a civil penalty for a violation or five years after the date the employer was convicted of or pleaded guilty to a violation, the employer is guilty of specified criminal penalties (see "**Criminal penalties**," below).

Enforcement and administration of the misclassification prohibition

The bill requires the Administrator to enforce the bill's employee misclassification prohibition. The Administrator must adopt reasonable rules in accordance with Ohio's Administrative Procedure Act to implement and administer the bill, including rules to establish an expedited hearing process for an employer against whom a stop work order is issued (see "**Stop work orders**," below).¹⁵

Complaints, investigations, hearings

The bill allows an individual to file a complaint with the Administrator against an employer if the individual reasonably believes that the employer is in violation of the bill's employee misclassification prohibition. The bill requires the Administrator to conduct an investigation into whether the employer violated the bill's prohibition upon receipt of a complaint.

¹² Ohio Department of Taxation, Frequently Asked Questions, <http://www.tax.ohio.gov/faq.aspx> (November 1, 2015).

¹³ R.C. 5747.01(HH).

¹⁴ R.C. 4175.02.

¹⁵ R.C. 4175.03.

The Administrator may do all of the following in investigating a complaint:

- (1) Enter and inspect, at all reasonable times, all of the offices and job sites maintained by the employer who is the subject of the complaint;
- (2) Examine and copy business records;
- (3) Compel, by subpoena, the attendance and testimony of witnesses and the production of books, payroll, records, papers, and other evidence;
- (4) Administer oaths to witnesses.¹⁶

If, after an investigation, the Administrator determines that reasonable evidence exists that an employer has violated the bill's employee misclassification prohibition, the bill requires the Administrator to do both of the following:

- (1) Within 72 hours after the determination, issue a stop work order against the employer (see "**Stop work orders**," below);
- (2) Within seven days after the determination, send a written notice to the employer who is the subject of the investigation in the same manner as prescribed in the Administrative Procedure Act for licensees, except that the notice must specify that a hearing will be held and must specify the date, time, and place of the hearing.

The bill requires the Administrator to hold a hearing regarding an alleged violation in the same manner prescribed for an adjudication hearing under the Administrative Procedure Act. The bill specifies that, if an employer who allegedly committed a violation of the bill's employee misclassification prohibition fails to appear for a hearing, the Administrator may make a determination without the employer's appearance or request the court of common pleas of the county where the alleged violation occurred to compel the employer to appear before the Administrator for a hearing.

If the Administrator, after a hearing, determines a violation has occurred, the Administrator must discipline the employer in accordance with the bill (see "**Disciplinary actions**," below). An employer may appeal the Administrator's determination in accordance with the Administrative Procedure Act, but the bill specifies that a stop work order issued under the bill is not subject to suspension by the court during the pendency of that appeal.

¹⁶ R.C. 4175.04.

The Administrator's determination that an employer has misclassified an employee as an independent contractor is binding on the JFS Director and the Tax Commissioner unless the individual is otherwise not considered to be an employee under the applicable law. However, nothing in the bill limits or otherwise constrains the Administrator's duties and powers under the Workers' Compensation Law, the JFS Director's duties and powers under the Unemployment Compensation Law, or the Tax Commissioner's duties and powers under the Income Tax Law.¹⁷

Disciplinary actions

If, after a hearing, the Administrator determines that an employer has violated the bill's employee misclassification prohibition, the Administrator is required to do all of the following:

(1) Notify the JFS Director and the Tax Commissioner, each of whom must determine whether the employer's violation results in the employer not complying with the requirements of the Unemployment Compensation Law or the Income Tax Law, as applicable;

(2) Continue to enforce the stop work order issued against the employer in accordance with the bill (see "**Stop work orders**," below);

(3) Assess against the employer a penalty of \$5,000 for each employee the employer misclassified as an independent contractor in violation of the bill's prohibition.

Additionally, the bill allows the Administrator to assess an additional amount against an employer who has previously violated the bill's employee misclassification prohibition.¹⁸

Stop work orders

The bill requires the Administrator to issue a stop work order, requiring the cessation of all business operations, against an employer if after an investigation the Administrator determines that reasonable evidence exists that an employer has violated the bill's employee misclassification prohibition. A stop work order applies to all worksites in Ohio for which the Administrator determined that reasonable evidence exists that the employer has violated that prohibition. The stop work order takes effect when the order is served upon the employer. However, if the Administrator's

¹⁷ R.C. 4175.05.

¹⁸ R.C. 4175.06.



determination applies to only one of the employer's worksites, the bill allows the Administrator to serve a stop work order on the particular worksite by posting a copy of the order in a conspicuous location at the worksite. In that case, the stop work order takes effect for the particular worksite upon service at the worksite.

The Administrator must assess a penalty of \$5,000 against an employer for each day that the employer conducts business operations in violation of a stop work order.

The bill limits a stop work order to the work of the employer for whom the Administrator makes a determination as described above, except a stop work order or penalty issued for violating a stop work order applies to any successor corporation or business entity that has one or more of the same principles or officers as the employer against whom the stop work order was issued and is engaged in the same or similar trade or activity as that employer. The bill specifies that it cannot be construed to require any work performed by someone other than the employer or the employer's employees to cease.

A stop work order remains in effect until the Administrator issues an order to release the stop work order. The bill requires the Administrator to issue an order of release upon either of the following events:

(1) The Administrator determines that the employer did not violate the employee misclassification prohibition after a hearing held in accordance with the bill;

(2) If the Administrator determined that the employer did violate the employee misclassification prohibition after such a hearing, the Administrator determines that the employer is no longer in violation and has paid any penalty assessed under the bill.

The bill allows the Administrator to issue an order of conditional release from a stop work order upon a finding that the employer is no longer in violation of the bill's employee misclassification prohibition and has agreed to remit period payments of any penalty assessed under the bill pursuant to a payment agreement schedule with the Administrator. A payment agreement schedule must require an initial payment of at least \$1,000. If an employer fails to meet any term or condition of a penalty payment agreement, the bill requires the Administrator to immediately reinstate a stop work order and requires the entire unpaid balance of the penalty to immediately become due.

The bill allows the Administrator to require an employer, as a condition of release from a stop work order, to file periodic reports with the Administrator to demonstrate the employer's continued compliance with the bill for a probationary

period that cannot exceed two years from the date the Administrator issues the release order.¹⁹

Criminal penalties

For any subsequent violation of the employee misclassification prohibition within five years after the date the employer previously was assessed a civil penalty for violating that prohibition or five years after the date the employer was convicted of or pleaded guilty to violating that prohibition, the employer is guilty of the following:

(1) If the amount the employer is liable for due to the violation is less than \$20,000, a third degree felony;

(2) If the amount the employer is liable for due to the violation is \$20,000 or more, but less than \$100,000, a second degree felony;

(3) If the amount is \$100,000 or more, a first degree felony.²⁰

Employee Classification Fund

The bill creates in the state treasury the Employee Classification Fund. The Administrator must deposit all moneys the Administrator receives under the bill, including civil penalties, into the Fund. The Administrator must use the Fund for the administration, investigation, and other expenses incurred in carrying out the Administrator's powers and duties under the bill.²¹

HISTORY

ACTION	DATE
Introduced	10-06-15

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¹⁹ R.C. 4175.061.

²⁰ R.C. 4175.99.

²¹ R.C. 4175.07.

