Ohio Legislative Service Commission

Bill Analysis

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(As Introduced)

Sens. Yuko, Brown, Tavares, Schiavoni, Skindell, Thomas

BILL SUMMARY

Minimum wage

- Increases the state basic minimum wage to $10.15 per hour beginning January 1, 2018.
- Increases the state minimum wage for tipped employees to $5.08 per hour beginning January 1, 2018.
- Requires the state minimum wage rates to be adjusted annually in accordance with the Minimum Wage Amendment to the Ohio Constitution.
- Eliminates a prohibition against a political subdivision establishing a minimum wage that is different from the state minimum wage rates.

Overtime

- Makes an executive, administrative, or professional employee earning up to $50,000 beginning January 1, 2018, and $69,000 beginning January 1, 2019, eligible to receive overtime wages.

Definition of employee

- Creates a generally uniform definition of and test for determining who is an "employee" for purposes of the portions of the Minimum Fair Wage Standards Law governing minimum wage, the Bimonthly Pay Law, the Prevailing Wage Law, the Workers' Compensation Law, the Unemployment Compensation Law, and the Income Tax Law.

Changes to existing law definitions of "employee"

- Removes the ability of an individual incorporated as a corporation to elect to obtain workers' compensation coverage.

- Expands the definition of "employment" for purposes of the Unemployment Compensation Law as it relates to services provided by delivery drivers and specified salespersons.

- Removes the exemption from the definition of "employment" for purposes of the Unemployment Compensation Law concerning specified services performed by an individual on a commission basis.

Classification of individuals as "employees"

- Prohibits an employer from failing to designate as an employee an individual who meets the bill's definition of employee.

- Prohibits an employer from retaliating against an individual who takes specified actions listed in the misclassification portion of the bill.

- Prohibits an employer from attempting to cause or causing an individual to waive the misclassification portion of the bill or to enter into a pre-dispute waiver.

- Prohibits any person from requiring or requesting an individual to enter into an agreement or sign a document that results in the individual's misclassification as an independent contractor or otherwise does not accurately reflect the individual's relationship with an employer.

- Creates criminal and civil penalties for whoever violates any of the bill's misclassification prohibitions, and doubles the civil penalties if the employer knowingly committed such a violation.

- Requires the Director of Commerce to administer and enforce the misclassification portions of the bill.

- Requires the Director of Commerce, the Director of Job and Family Services (JFS Director), the Tax Commissioner, and the Administrator of Workers' Compensation to share information concerning any suspected misclassification by an employer.

- Makes the determination by the Director of Commerce that an employer has misclassified an employee as an independent contractor binding on the JFS Director, the Tax Commissioner, and the Administrator unless the individual is otherwise not considered an employee under the applicable law.

- Makes a contractor or subcontractor liable for the failure of a subcontractor or lower tier subcontractor to properly classify an individual as an employee.

- Prohibits any state agency from entering into a contract with an employer included in the list of employers that have violated the bill's misclassification prohibitions multiple times for a period of four years after the date of the employer's most recent violation.

- Permits an aggrieved party, as defined by the bill, to file a misclassification suit against an employer without regard to exhaustion of any alternative administrative remedies provided in the bill.

- Allows an aggrieved party to file an action to recover civil penalties assessed by the Director against an employer in a misclassification proceeding.

- Creates the Employee Classification Fund, and requires the Director to use the Fund to administer and enforce the misclassification portions of the bill.

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State minimum wage

The bill raises the state minimum wage rate payable to most employees to $10.15 per hour beginning January 1, 2018.[1] The current basic state minimum wage is $8.30 per hour and will increase to $8.55 per hour beginning January 1, 2019. The basic state minimum wage is currently set pursuant to the Minimum Wage Amendment of the Ohio Constitution (MWA). The MWA requires the basic state minimum wage to be increased annually according to the Consumer Price Index or its successor index for all urban wage earners and clerical workers for all items as calculated by the federal government, rounded to the nearest five cents. However, the MWA allows laws to be passed that set the state minimum wage at a rate higher than the rate calculated pursuant to MWA.[2] The bill sets a higher minimum wage rate while retaining the annual recalculation requirement.[3]

The bill maintains current law with respect to paying the following employees the federal minimum wage rate, which is $7.25 per hour, as required under the MWA: employees who are under 16 years of age or employees who are employed by a business with gross annual receipts of $305,000 or less in 2017. Under the MWA, the amount of gross annual receipts is adjusted annually based on the Consumer Price Index. Thus, beginning January 1, 2019, the MWA requires a business with gross annual receipts of $314,000 or less in 2018 to pay its employees no less than the federal minimum wage.[4]

Under continuing law, tipped employees may be paid less than, but not less than half, the basic state minimum wage rate if the employer is able to demonstrate that the

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[1] R.C. 4111.02.

[2] Ohio Const., art. II, sec. 34a and Ohio Department of Commerce, *2018 Minimum Wage*, https://www.com.ohio.gov/documents/dico_2018MinimumWageposter.pdf; and Ohio Department of Commerce Division of Industrial Compliance, State of Ohio 2019 Minimum Wage, https://www.com.ohio.gov/documents/dico_2019MinimumWageposter.pdf.

[3] R.C. 4111.02, with conforming changes in R.C. 4111.09 and 4111.14.

[4] R.C. 4111.02(A)(3); Ohio Const., art. II, Sec. 34a; 29 United States Code (U.S.C.) 206; Ohio Department of Commerce Division of Industrial Compliance, State of Ohio 2018 Minimum Wage, https://www.com.ohio.gov/documents/dico_2018MinimumWageposter.pdf; and Ohio Department of Commerce Division of Industrial Compliance, State of Ohio 2019 Minimum Wage, https://www.com.ohio.gov/documents/dico_2019MinimumWageposter.pdf.

employee receives tips that combined with the wages paid by the employer are equal to or greater than the state minimum wage rate for all hours worked. Because the bill raises the state minimum wage to $10.15 per hour, the minimum wage for tipped employees would also increase from $4.15 per hour in 2018 and $4.30 per hour in 2019 to $5.08 per hour.[5]

Relationship between state and federal law

The federal Fair Labor Standards Act[6] (FLSA) and Ohio's minimum wage laws both specify minimum wages that an employer must pay the employer's employees. An employer may be subject to one or both laws. Under the FLSA, if an employer is subject to both laws, the employer is governed by the law that establishes the higher minimum wage, or, for purposes of determining overtime, the lower maximum workweek.[7] Currently, Ohio has the same maximum workweek as specified in the FLSA (40 hours per week) but has a higher basic minimum wage ($8.30 per hour in 2018 and $8.55 in 2019) as compared to the basic minimum wage under the FLSA ($7.25 per hour). Thus, employers subject to both laws pay the state rate under current law and under the bill.

Political subdivisions minimum wage

Current law prohibits a political subdivision from establishing a minimum wage rate that is different from the required state minimum wage rate as described under "**State minimum wage**" above. The bill eliminates this prohibition.[8] This prohibition was declared unconstitutional for violating the single subject rule of the Ohio Constitution. It is currently not enforced.[9] It is unclear whether a political subdivision has the authority under the Ohio Constitution to adopt an ordinance or resolution setting a minimum wage.[10]

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[5] R.C. 4111.02(A)(2); Ohio Const., art. II, sec. 34a; and Ohio Department of Commerce, *2018 Minimum Wage*, https://www.com.ohio.gov/documents/dico_2018MinimumWageposter.pdf and Ohio Department of Commerce Division of Industrial Compliance, State of Ohio 2019 Minimum Wage, https://www.com.ohio.gov/documents/dico_2019MinimumWageposter.pdf.

[6] 29 U.S.C. 201 *et seq.*

[7] 29 U.S.C. 218.

[8] R.C. 4111.02.

[9] Ohio Const., art. II, sec. 15(D) and *City of Bexley v. State*, 92 N.E.3d 397 (Franklin County 2017).

[10] See Ohio Const., art II., secs. 34 and 34a and art. XVIII, sec. 3.

Overtime

The bill expands the scope of Ohio employees who may be eligible to receive overtime wages. Under current law, an employer must pay overtime wages to an employee at a rate of 1½ times the employee's hourly wage rate for hours worked by that employee in excess of 40 in one workweek. Continuing law exempts certain individuals from this requirement, including an individual who is employed in a bona fide executive, administrative, or professional capacity, as defined by the FLSA. Under the bill, for 2018, a bona fide executive, administrative, or professional employee is exempt only if the employee is compensated on a salary basis of at least $50,000 per year. Beginning in 2019, such an employee is exempt only if the employee is compensated on a salary basis of at least $69,000 per year.[11]

Definition of "employee"

Currently, the portions of the Minimum Fair Wage Standards Law (MFWS) governing the minimum wage, the Bimonthly Pay Law, the Prevailing Wage Law, the Workers' Compensation Law, the Unemployment Compensation Law, and the Income Tax Law either 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. The bill creates a generally uniform definition of "employee" for purposes of these laws. Except as otherwise specified below, "employee" under the bill means an individual who performs services for compensation for an employer. "Employee" does not mean an individual who performs services for an employer and to whom all of the following conditions apply:

(1) The individual has been and continues to be free from control and direction in connection with the performance of the service.

(2) The individual customarily is engaged in an independently established trade, occupation, profession, or business of the same nature of the trade, occupation, profession, or business involved in the service performed.

(3) The individual is a separate and distinct business entity from the entity for which the service is being performed or, if the individual is providing construction services and is a sole proprietorship or a partner in a partnership, the individual is a legitimate sole proprietorship or a partner in a legitimate partnership to which the provisions described under "**Legitimate sole proprietorship or partnership for construction services**" below apply, as applicable.

[11] R.C. 4111.03, with conforming changes in R.C. 119.14 and 4111.13.

(4) The individual incurs the main expenses and has continuing or recurring business liabilities related to the service performed.

(5) The individual is liable for breach of contract for failure to complete the service.

(6) An agreement exists describing the service to be performed, the payment the individual will receive for performance, and the time frame for completion.

(7) The service performed by the individual is outside of the employer's usual course of business.[12]

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

(1) For minimum wage, the "economic realities" test;[13]

(2) For income tax and unemployment, variations on the common law "20-factor" test;[14]

(3) For the other laws, whether the employer reserves the right to control the means and manner of doing the work.[15]

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.

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 that Law (see "**Other labor**

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[12] R.C. 4177.01(D).

[13] *See Donovan v. Brandal*, 736 F.2d 1114 (6th Cir. 1984), *Solis v. Cascom, Inc.*, 2011 WL 10501391, case No. 3:0-cv-257 (S.D. Ohio 2011), and U.S. Department of Labor, *Fact Sheet #13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act (FLSA)* (May 2014), https://www.dol.gov/whd/regs/compliance/whdfs13.pdf.

[14] *See* U.S. Department of Labor, *Conformity Requirements for State UC Laws: Coverage*, https://workforcesecurity.doleta.gov/unemploy/pdf/uilaws_coverage.pdf; Ohio Department of Taxation, Frequently Asked Questions, http://www.tax.ohio.gov/faq.aspx; U.S. Department of the Treasury Internal Revenue Service, "Employee or Independent Contractor?," *Employer's Supplemental Tax Guide*, IRS Publication 15-A (February 21, 2018), https://www.irs.gov/pub/irs-pdf/p15a.pdf; R.C. 4141.01; and Ohio Administrative Code 4141-3-05.

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

and employment laws" below).[16] Under the Income Tax Law, "employee" has the same meaning as described above unless the Internal Revenue Service has accepted the classification of an individual as an independent contractor made by the individual and the individual's payer.[17]

For purposes of the employee misclassification portion of the bill, "employer" means any person, the state, any state agency or instrumentality, and any municipal corporation, county, township, school district, or other political subdivision or any agency or instrumentality thereof that engages an individual to perform services.[18] The bill, however, does not change the definition of "employer" found in each of the laws listed above.

Legitimate sole proprietorship or partnership for construction services

Under the bill, an employer and the Director of Commerce must consider a sole proprietorship or partnership that performs construction services for the employer to be a legitimate sole proprietorship or a legitimate partnership if the employer demonstrates all of the following:

(1) The sole proprietorship or partnership performs the construction service free from the employer's direction or control over the means and manner of providing the service, subject only to the employer's right to specify the desired result.

(2) The sole proprietorship or partnership is not subject to cancellation or destruction on severance of the relationship with the employer.

(3) The sole proprietorship owner or the partners have a substantial investment of capital in the sole proprietorship or partnership beyond ordinary tools and equipment and a personal vehicle.

(4) The sole proprietorship or partnership owns the capital goods, gains the profits, and bears the losses of the sole proprietorship or partnership.

(5) The sole proprietorship or partnership makes its construction services available to the general public or the business community on a continuing basis.

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[16] R.C. 4141.01(EE).

[17] R.C. 5747.01(II).

[18] R.C. 4177.01(E).

(6) The sole proprietorship or partnership reported a profit or loss or earnings from self-employment on the sole proprietorship or partnership's federal income tax schedule.

(7) The sole proprietorship or partnership performs construction services for the employer under the sole proprietorship's or partnership's name.

(8) If the construction services the sole proprietorship or partnership provides to the employer require a license or permit to provide those services, the sole proprietorship or partnership obtains the appropriate license or permit in the sole proprietorship's or partnership's name and directly pays for the appropriate license or permit.

(9) The sole proprietorship or partnership furnishes the tools and equipment necessary for the sole proprietorship or partnership to provide the construction service for the employer.

(10) If necessary, the sole proprietorship or partnership hires its own employees without obtaining employer approval, pays those employees without direct reimbursement from the employer, and reports the employees' income to the Internal Revenue Service.

(11) The employer does not represent the sole proprietorship or the partners as an employee of the employer to the employer's customers.

(12) The sole proprietorship or partnership performs similar construction services for others on whatever basis and whenever the sole proprietorship or partnership chooses.[19]

If the Director, using the factors listed in (1) to (12) above, determines that a sole proprietorship or partnership performing construction services for an employer is not a legitimate sole proprietorship or a legitimate partnership, the Director must consider the sole proprietorship owner, each partner, and each of the sole proprietorship's or partnership's employees, as applicable, as an employee of the employer for the purposes of the bill.[20]

[19] R.C. 4177.04(A) to (L).

[20] R.C. 4177.04.

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

Minimum Fair Wage Standards Law

As mentioned above, the MWA requires employers to pay employees at least the minimum wage. Under the MWA, "employee" has the same meaning as under the FLSA, except that "employee" does not include an individual employed in or about the property of the employer or individual's residence on a casual basis. The MWA expressly allows laws to be passed to expand its coverage.[21]

Ohio's Minimum Fair Wage Standards Law (MFWS) implements the MWA. The bill expands the definition of "employee" for the MFWS to the definition of "employee" described under "**Definition of "employee"**" above and removes a current law requirement that due consideration and great weight must be given to the U.S. Department of Labor's and federal courts' interpretations of the term "employee" under the FLSA and its regulations.[22] (See **COMMENT**.)

Ohio's 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 volunteer police officers and firefighters and off-duty police, fire, and other first responders.

The bill retains four of the five current law exceptions to the definition of "employee" but removes the exemption for an individual incorporated as a corporation. However, because of the bill's definition of "employee" it does not appear that such an individual would be an "employee" for workers' compensation purposes even without the exemption. But by removing the exemption, the bill removes the ability of such an individual to elect to obtain coverage under the Workers' Compensation Law.

The bill also eliminates a current law provision that every person who performs labor or provides services pursuant to a construction contract is an "employee" if at least ten of 20 specified criteria apply. Also, with respect to construction, the bill removes the requirement that a contractor is liable for the failure of a subcontractor to obtain coverage under the Workers' Compensation Law; however, as discussed under

[21] Ohio Const., art. II, sec. 34a.

[22] R.C. 4111.02(C) and 4111.14(B).

"**Contractors and subcontractors**" below, under the bill, a contractor or subcontractor is liable for the failure of a subcontractor or lower tier subcontractor to properly classify an employee.[23]

Other labor laws

"Employee" is not currently statutorily defined for purposes of the Bimonthly Pay Law, Prevailing Wage Law, Unemployment Compensation Law, or Income Tax Law. The bill adds the definition of employee described under "**Definition of "employee"**" to all of these laws.[24]

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 an officer of a corporation, 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 (JFS Director) 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 specifies that the determination of whether an individual is free from direction and control over the performance of the individual's service is made by the Director of Commerce under the bill's misclassification provisions.[25]

The Unemployment Compensation Law lists specific services that are included in the definition of "employment." The bill expands the definition of "employment" as it relates to delivery drivers, to include in the definition a "delivery driver," rather than an agent driver or commission driver as under current law, engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (including milk, which is excluded under current law), laundry, parcels (added by the bill), freight (added by the bill), dry-cleaning services, or similar products (added by the bill). The bill removes the requirement that the distribution be for the individual's employer or principal.[26]

The bill also modifies the definition of "employment" as it relates to service performed as a traveling or city salesperson, removing the requirement that the services

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

[24] R.C. 4113.15, 4115.03, 4141.01(EE), and 5747.01(II).

[25] R.C. 4141.01(B)(1).

[26] R.C. 4141.01(B)(2)(e)(i).

specified in continuing law be deemed employment if the contract of service contemplates that substantially all of the services are to be performed personally by the individual and that the individual does not have a substantial investment in facilities used in connection with the performance of the services other than in facilities for transportation, and the services are not in the nature of a single transaction that is not a part of a continuing relationship with the person for whom the services are performed.[27]

In addition, the bill removes the current law test to determine whether construction services provided by an individual are considered employment, under which it is employment if ten out of 20 criteria are satisfied.[28]

The Unemployment Compensation Law also excludes specified services from the definition of employment. The bill removes the exemption for services performed for one or more principals by an individual who is compensated on a commission basis, who in the performance of the work is master of the individual's own time and efforts, and whose remuneration is wholly dependent on the amount of effort the individual chooses to expend, and which service is not subject to the "Federal Unemployment Tax Act."[29]

Prohibitions regarding misclassifying employees

The bill prohibits an employer from failing to designate an individual who performs services for the employer as an employee unless the conditions described in (1) to (7) under "**Definition of "employee"**" above apply to that individual.[30] The bill also prohibits any employer from retaliating through discharge, or in any other manner, against an individual for exercising a right granted under the bill. Additionally, an employer is prohibited from retaliating against an individual if the individual does any of the following:

- Makes a complaint to an employer, coworker, community organization, or to a federal or state agency or at a public hearing, stating that the bill's misclassification provisions allegedly have been violated;

- Causes to be instituted any proceeding under or related to misclassification;

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[27] R.C. 4141.01(B)(2)(e)(ii).

[28] R.C. 4141.01(B)(2)(k).

[29] 26 U.S.C. 3301 to 3311; R.C. 4141.01(B)(3)(g).

[30] R.C. 4177.02(A).

- Testifies or prepares to testify in an investigation or proceeding under the bill;

- Opposes misclassification.

Additionally, under the bill, an employer is prohibited from attempting to cause or causing an individual to waive the bill's misclassification provisions or to enter into a pre-dispute waiver. The bill also prohibits any person from requiring or requesting an individual to enter into an agreement or sign a document that results in the individual's misclassification as an independent contractor or otherwise does not accurately reflect the individual's relationship with an employer.

An employer also is prohibited from violating a rule adopted by the Director pursuant to the bill.[31]

Except with respect to a violation against the prohibition regarding waivers, an employer or person who knowingly violates any of the prohibitions described immediately above, for the first offense, is guilty of a fourth degree misdemeanor. For any subsequent violation of those prohibitions committed within a five-year period beginning on the date the employer or person previously was convicted of or pleaded guilty to the first violation, the employer or entity is guilty of a fifth degree felony. Whoever violates the prohibition against attempting to cause or causing an individual to waive the bill's misclassification provisions or to enter into a pre-dispute waiver is guilty of a fourth degree misdemeanor.[32] An employer who violates any of the prohibitions described above also may be subject to sanctions from the Director of Commerce as well as a civil suit by an aggrieved party as described in the bill (see "**Disciplinary actions**" and "**Aggrieved party action**" below).

Contractors and subcontractors

The bill's misclassification provisions apply to all subcontractors or lower tier subcontractors. A contractor is liable under the bill for the failure of any subcontractor or lower tier subcontractor to properly classify individuals performing services related to construction as employees. Similarly, a subcontractor is liable under the bill for the failure of any lower tier subcontractor to properly classify individuals performing services related to construction as employees.

A "contractor," under the bill, means any sole proprietorship, partnership, firm, corporation, limited liability company, association, or other entity permitted by law to

[31] R.C. 4177.02.

[32] R.C. 4177.99.

do business within Ohio that engages in construction. "Contractor" does not include the federal government or the state or its officers, agencies, or political subdivisions. A "subcontractor" is any person who undertakes to perform construction services under a contract with any individual other than the owner, part owner, or lessee.[33]

Enforcement and administration of the bill's misclassification prohibitions

The bill requires the Director of Commerce to enforce the bill's misclassification prohibitions. However, the Superintendent of Industrial Compliance within the Department of Commerce may perform those duties delegated to the Superintendent by the Director under the bill. The Director must hire as many investigators and other personnel as the Director determines are necessary to administer and enforce the bill's misclassification provisions. The bill permits the Director to adopt reasonable rules in accordance with Ohio's Administrative Procedure Act to implement and administer these provisions.[34]

Complaints, investigations, and hearings

Under the bill, any aggrieved party may file a complaint with the Director against an employer if the aggrieved party reasonably believes that the employer is in violation of the bill's misclassification prohibitions.[35] An "aggrieved party" is any of the following individuals or entities that believe that the individual or entity has been injured by an employer's alleged violation of the bill's misclassification prohibitions:

(1) An employee;

(2) An employer association;

(3) An interested party;

(4) A labor organization.[36]

The bill requires the Director to conduct investigations in connection with the administration and enforcement of the bill's misclassification prohibitions. Any investigator employed by the Division of Industrial Compliance within the Department of Commerce may visit and inspect, at all reasonable times, all of the offices and job sites maintained by the employer who is the subject of the complaint, and may inspect

[33] R.C. 4177.01(C) and (I) and 4177.05.

[34] R.C. 121.083(B) and 4177.06.

[35] R.C. 4177.07.

[36] R.C. 4177.01(A).

and audit, at all reasonable times, all documents necessary to determine whether an individual performing services for the employer is an employee. The Director may compel, by subpoena, the attendance and testimony of witnesses and the production of books, payrolls, records, papers, and other evidence in any investigation, and may administer oaths to witnesses. On completion of an investigation, the investigator must submit the results to the Superintendent.[37]

If, after receiving the results, the Superintendent determines that reasonable evidence exists that an employer has violated the bill's misclassification prohibitions, the Superintendent must send a written notice to the Director informing the Director of the Superintendent's determination. Within seven days after the Director receives the written report, the Director must 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 Director must hold a hearing regarding the alleged violation in the same manner prescribed for an adjudication hearing under the Administrative Procedure Act. If an employer who allegedly committed a violation of the bill's misclassification prohibitions fails to appear for a hearing, the Director may request the court of common pleas of the county where the alleged violation occurred to compel the person to appear before the Director for a hearing.[38]

In determining whether an employer misclassified an employee in violation of the bill, the Director cannot use an employer's failure to withhold federal or state income taxes with respect to an individual or to include remuneration paid to an individual for purposes of the Workers' Compensation Law or Unemployment Compensation Law when making a determination as to whether the employer violated this prohibition. The bill prohibits the Director from using an individual's election to obtain workers' compensation coverage as a sole proprietor or a partnership in making a determination as to whether the individual has violated this prohibition. The burden of proof is on the party asserting that an individual is not an employee.[39]

If the Director, after the hearing, determines a violation has occurred, the Director may discipline the employer in accordance with the bill (see "**Disciplinary**

[37] R.C. 4177.07.

[38] R.C. 4177.08, by reference to R.C. 119.07 and 119.09, not in the bill.

[39] R.C. 4177.02(A).

actions" below). The employer may appeal the Director's determination to the Franklin County Court of Common Pleas in accordance with the Administrative Procedure Act.[40]

Applicability of the determination made by the Director of Commerce

The bill's misclassification provisions apply only to determinations as to whether an individual is an employer for purposes of the minimum wage portions of the MFWS, the Bimonthly Pay Law, the Prevailing Wage Law, the Workers' Compensation Law, the Unemployment Compensation Law, and the Income Tax Law. Nothing in the bill is to be construed as to limit the application of any other remedies available at law or in equity.[41]

Under the bill, the Director of Commerce, the JFS Director, the Tax Commissioner, and the Administrator of Workers' Compensation must share information concerning any suspected misclassification by an employer or entity of one or more of the employer's employees as independent contractors in violation of the prohibition against employee misclassification under the bill. On determining that an employer has misclassified an employee as an independent contractor in violation of that prohibition, the Director of Commerce must notify the JFS Director, the Tax Commissioner, and the Administrator, each of whom must determine whether the employer's violation results in the employer not complying with the requirements of the MFWS, the Bimonthly Pay Law, the Prevailing Wage Law, the Workers' Compensation Law, the Unemployment Compensation Law, and the Income Tax Law, as applicable. The determination made by the Director of Commerce that an employer has misclassified an employee is binding on the JFS Director, the Tax Commissioner, and the Administrator unless the individual is otherwise not considered an employee under the applicable law. Notwithstanding anything in this provision to the contrary, nothing in the bill is permitted to be construed to limit or otherwise constrain the duties and powers of the Administrator under the Workers' Compensation Law, the JFS Director under the Unemployment Compensation Law, or the Tax Commissioner under the Income Tax Law.[42]

Disciplinary actions

If, after a hearing held in accordance with the bill, the Director of Commerce determines that an employer violated the prohibitions listed under "**Prohibitions**

[40] R.C. 4177.08, by reference to R.C. 119.12, not in the bill.

[41] R.C. 4177.03.

[42] R.C. 4177.17.

regarding misclassifying employees" above, the Director may do any of the following:

(1) Issue and cause to be served on any party an order to cease and desist from further violation of the prohibitions;

(2) Take affirmative or other action the Director considers reasonable to eliminate the violation's effect;

(3) Collect the amount of any wages, salary, employment benefits, or other compensation denied or lost to an individual because the employer misclassified the individual;

(4) Assess any civil penalty allowed under "**Civil penalties**" below.[43]

Additionally, the bill requires the Attorney General to bring any action for relief requested by the Director in the name of the people of the state of Ohio.[44]

Civil penalties

Except as otherwise provided below, if, after a hearing, the Director determines that an employer has violated the bill's misclassification prohibitions, the employer may be subject to a civil penalty of $1,500 for each violation. Except as otherwise provided under "**Knowing violations**" below, if, after a hearing, the Director determines that the employer has committed a violation of the bill's misclassification prohibitions and that violation occurred within five years after the date the Director made a determination that resulted in the Director assessing the employer a civil penalty for such a violation, the employer may be subject to a civil penalty of $1,500 to $2,500 for each violation found by the Director that occurred during that five-year period.[45]

For purposes of this provision, each violation constitutes a separate violation for each individual or rule involved and for each day the violation continues. The Director must base the amount of the civil penalty on the Director's determination of the gravity of the violations committed by the employer.[46]

If the Director assesses an employer a civil penalty and the employer fails to pay that civil penalty within the time period prescribed by the Director, the Director must

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[43] R.C. 4177.09(A).

[44] R.C. 4177.09(C).

[45] R.C. 4177.10(A) and (B).

[46] R.C. 4177.10(C) and (D).

forward to the Attorney General the name of the employer and the amount of the civil penalty for the purpose of collecting that civil penalty. In addition to the civil penalty assessed, the employer also must pay any fee assessed by the Attorney General for collection of the civil penalty.[47]

Knowing violations

Whoever knowingly violates the bill's prohibitions, or whoever obstructs the Director or any other person authorized to inspect places of employment pursuant to "**Complaints, investigations, and hearings**" above, may be liable for penalties up to double the amount specified under "**Civil penalties**" above. An employer who is liable under this provision because the employer knowingly violated the bill's misclassification prohibitions also is liable to the employee who was injured by the employer's violation for punitive damages in an amount equal to the amount of the penalties assessed against the employer pursuant to this provision. The Director must impose these penalties if a preponderance of the evidence demonstrates that the employer acted knowingly when committing the violation.[48]

Referral for prosecution

Under the bill, if the Director determines that an alleged violation of the bill's misclassification provisions has occurred that may result in a criminal penalty being assessed, the Director must refer the matter to the appropriate prosecutorial authority.[49]

Enforcement of Director's order

Under the bill, if the Director believes that any employer allegedly has violated a valid order issued by the Director under "**Disciplinary actions**" above, the Director may sue in the court of common pleas in the county where the alleged violation has occurred and obtain from the court an order compelling the employer to obey the Director's order or be found guilty of contempt of court and punished in accordance with the Contempt of Court Law.[50]

Aggrieved party action

The bill also permits an aggrieved party to file suit in the court of common pleas in the county where the alleged violation of the bill's misclassification prohibitions

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[47] R.C. 4177.09(B).

[48] R.C. 4177.11.

[49] R.C. 4177.12.

[50] R.C. 4177.13.

occurred or where any individual who is party to the action resides, without regard to exhaustion of any alternative administrative remedies provided in the bill. An aggrieved party may sue on behalf of the aggrieved party or on behalf of any other individual who is similarly situated to the aggrieved party. If a court or a jury in a lawsuit brought pursuant to this provision determines that a violation of the bill's misclassification prohibitions has occurred, the court must award to the plaintiff all of the following:

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

(2) Compensatory damages and an amount up to $500 for each violation of the bill's misclassification prohibitions;

(3) In the case of a violation of the bill's retaliation prohibitions, all legal or equitable relief that the court determines appropriate;

(4) Attorney's fees and costs.

The bill requires an aggrieved party to file suit not later than three years after the last day the aggrieved individual or individual on whose behalf the aggrieved party is suing performed services for an employer. The bill tolls this three-year period if the employer has deterred the ability of an individual to sue under this provision or to file a complaint with the Director as described under "**Complaints, investigations, and hearings**" above.

If the Director has determined after a hearing that an employer is subject to a civil penalty, an aggrieved party, within 90 days after the Director issues that determination, may sue in the court of common pleas in the county where the violation occurred to enforce that penalty. If an aggrieved party elects to sue, the aggrieved party must notify the Director of that election in writing. During that 90-day period, the bill prohibits the Attorney General from bringing an action to enforce that penalty. After the 90-day period expires, only the Attorney General, on behalf of the Director and in accordance with the bill, may sue to collect the civil penalty. In any lawsuit brought by an aggrieved party to enforce the penalty, the court must award the aggrieved party 10% of the amount of the penalty owed by the employer, and the remaining amount recovered must be awarded to the Director.[51]

[51] R.C. 4177.14.

Debarment list

Under the bill, the Director must create a list of employers who have committed multiple violations of the prohibitions listed under "**Prohibitions regarding misclassifying employees**" above. The Director must add an employer's name to the list if the Director assesses the higher (repeat violator) civil penalty described under "**Civil penalties**" above. The list must include the name of the employer and the date that the employer committed the employer's most recent violation. The Director must notify an employer that the employer will be added to this list within five days after the Director determines that the employer will be added to the list. The Director must publish the list on the Department of Commerce's website. The bill prohibits any state agency from entering into a contract with an employer included in that list for a period of four years after the date of the employer's most recent violation. The Director must remove an employer's name and information from the list on expiration of the time period of the employer's debarment.[52]

Posting of bill's requirements

The bill requires the Director to create a summary of the bill's employee classification requirements in English and Spanish and to post that summary on the Department's website and on the bulletin boards located in each of the Department's offices. If an employer engages an individual to perform services and that individual is not considered an employee, that employer must post and keep posted, in a conspicuous place on each job site where that individual performs services and in each of the employer's offices, the notice prepared by the Director. The Director must furnish copies of the notice without charge to an employer on request.[53]

Employee Classification Fund

The bill creates in the state treasury the Employee Classification Fund. The Director must deposit all moneys the Director receives under the bill's misclassification provisions, including civil penalties, into the Fund. The bill requires the Director to use the Fund for the administration, investigation, and other expenses incurred in carrying out the Director's powers and duties under the misclassification provisions. If, at the end of a fiscal year, the Director determines that excess moneys exist in the Fund, the Director must coordinate with the Director of Budget and Management to transfer the excess funds to the Division of Administration Fund within the Department.[54]

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[52] R.C. 4177.16.

[53] R.C. 4177.15.

[54] R.C. 4177.18.

Definitions

The employee misclassification portion of the bill defines the following terms:

Construction

"Construction" means any constructing, altering, reconstructing, repairing, rehabilitating, refinishing, refurbishing, remodeling, remediating, renovating, custom fabricating, maintenance, landscaping, improving, wrecking, painting, decorating, demolishing, and adding to or subtracting from any building, structure, highway, roadway, street, bridge, alley, sewer, ditch, sewage disposal plant, water works, parking facility, railroad, excavation, or other structure, project, development, real property or improvement, or to do any part thereof, regardless of whether the performance of the work involves the addition to or fabrication of any material or article of merchandise into any structure, project, development, real property, or improvement. "Construction" includes moving construction-related materials to the job site and removing construction-related materials from the job site.[55]

Interested party

"Interested party" means any of the following entities:

- Any contractor who submits a bid for the purpose of securing the award of a contract for construction of a public improvement as that term is defined under the Prevailing Wage Law;
- Any person acting as a subcontractor of a contractor described above;
- Any bona fide labor organization that has as members or is authorized to represent employees of a contractor or subcontractor described above;
- Any association having as members any of the contractors or subcontractors described above.[56]

COMMENT

The bill also removes the current MFWS definition of "independent contractor," which is defined, in accordance with the MWA, by reference to the FLSA. However,

[55] R.C. 4177.01(B).

[56] R.C. 4177.01(F).

because "independent contractor" is not specifically defined under the FLSA, the effect of the bill's change is unclear.[57]

HISTORY

ACTION	DATE
Introduced	02-07-17

S0038-I-132.docx/ec

[57] R.C. 4111.14(B).