

34:20-1

LEGISLATIVE HISTORY CHECKLIST

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LAWS OF: 2007 **CHAPTER:** 114
NJSA: 34:20-1 (Debars certain employers from public work)
BILL NO: A4009 (Substituted for S2579/2248)

SPONSOR(S): Caraballo and others

DATE INTRODUCED: February 22, 2007

COMMITTEE: **ASSEMBLY:** Labor

SENATE:

AMENDED DURING PASSAGE: Yes

DATE OF PASSAGE: **ASSEMBLY:** June 11, 2007

SENATE: June 18, 2007

DATE OF APPROVAL: July 13, 2007

FOLLOWING ARE ATTACHED IF AVAILABLE:

[FINAL TEXT OF BILL](#) (Second reprint enacted)

A4009

[SPONSOR'S STATEMENT](#): (Begins on page 6 of original bill) [Yes](#)

COMMITTEE STATEMENT: [ASSEMBLY:](#) [Yes](#)

SENATE: No

[FLOOR AMENDMENT STATEMENT:](#) [Yes](#)

LEGISLATIVE FISCAL ESTIMATE: No

S2579/2248

[SPONSOR'S STATEMENT \(S2579\)](#): (Begins on page 6 of original bill) [Yes](#)

[SPONSOR'S STATEMENT \(S2248\)](#): (Begins on page 4 of original bill) [Yes](#)

COMMITTEE STATEMENT: **ASSEMBLY:** No

[SENATE:](#) [Yes](#)

FLOOR AMENDMENT STATEMENT: No

LEGISLATIVE FISCAL ESTIMATE: No

VETO MESSAGE: No

[GOVERNOR'S PRESS RELEASE ON SIGNING:](#) [Yes](#) [7-17-07 - no longer available](#)

FOLLOWING WERE PRINTED:

To check for circulating copies, contact New Jersey State Government Publications at the State Library (609) 278-2640 ext.103 or <mailto:refdesk@njstatelib.org>

REPORTS: No

HEARINGS: No

NEWSPAPER ARTICLES: Yes

“Construction bill signed into law by governor,” Courier-Post, 7-18-07, p.1B

IS 4/15/08

Title 34.
Chapter 20 (New)
Classification of
Construction
Employees
§§1-11 -
C.34:20-1 to
34:20-11

P.L. 2007, CHAPTER 114, *approved July 13, 2007*
Assembly, No. 4009 (*Second Reprint*)

1 AN ACT concerning the classification of construction employees for
2 certain purposes and supplementing Title 34 of the Revised
3 Statutes.

4

5 **BE IT ENACTED** by the Senate and General Assembly of the State
6 of New Jersey:

7

8 1. This act shall be known and may be cited as the
9 “Construction Industry Independent Contractor Act.”

10

11 2. The Legislature finds that employers in the construction
12 industry who improperly classify employees as independent
13 contractors deprive these workers of proper Social Security
14 benefits²[, workers’ compensation]² and other benefits, while
15 reducing the employers’ State and federal tax withholdings and
16 related obligations. Moreover, this practice puts businesses ²[at a
17 competitive disadvantage]² that bear higher costs for complying
18 with the law ²at a competitive disadvantage².

19

20 3. For purposes of this act:

21 “Employer” means a partnership, association, joint stock
22 company, trust, corporation, or other legal business entity or
23 successor thereof who is primarily engaged in the business of, or
24 enters into a contract for, making improvements to real property and
25 includes any subcontractor or lower tier contractor.

26 “Public body” means the State of New Jersey, any of its political
27 subdivisions, any authority created by the Legislature of the State of
28 New Jersey and any instrumentality or agency of the State of New
29 Jersey or of any of its political subdivisions.

30 "Public work" means construction, reconstruction, demolition,
31 alteration, custom fabrication, or repair work, or maintenance work,
32 including painting and decorating, done under contract and paid for
33 in whole or in part out of the funds of a public body, except work
34 performed under a rehabilitation program. "Public work" shall also
35 mean construction, reconstruction, demolition, alteration, custom

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹Assembly ALA committee amendments adopted February 26, 2007.

²Assembly floor amendments adopted March 15, 2007.

1 fabrication, or repair work, done on any property or premises,
2 whether or not the work is paid for from public funds, if, at the time
3 of the entering into of the contract:

4 (a) Not less than 55% of the property or premises is leased by a
5 public body, or is subject to an agreement to be subsequently leased
6 by the public body; and

7 (b) The portion of the property or premises that is leased or
8 subject to an agreement to be subsequently leased by the public
9 body measures more than 20,000 square feet.

10

11 4. For purposes of the "New Jersey Prevailing Wage Act,"
12 P.L.1963, c.150 (C.34:11-56.25 et seq.), the "unemployment
13 compensation law," R.S.43:21-1 et seq., the "Temporary Disability
14 Benefits Law," P.L.1948, c.110 (C.43:21-25 et seq.), the "New
15 Jersey Gross Income Tax Act," N.J.S.54A:1-1 et seq., or other
16 applicable State tax laws, P.L.1965, c.173 (C.34:11-4.1 et seq.)² [,
17 the workers' compensation law, R.S.34:15-1 et seq.,]² and the
18 "New Jersey State Wage and Hour Law," P.L.1966, c.113 (C.34:11-
19 56a et seq.), services performed in the making of improvements to
20 real property by an individual for remuneration paid by an employer
21 shall be deemed to be employment unless and until it is shown to
22 the satisfaction of the Department of Labor and Workforce
23 Development that:

24 a. the individual has been and will continue to be free from
25 control or direction over the performance of that service, both under
26 his contract of service and in fact; and

27 b. the service is either outside the usual course of the business
28 for which the service is performed, or the service is performed
29 outside of all the places of business of the employer for which the
30 service is performed; and

31 c. the individual is customarily engaged in an independently
32 established trade, occupation, profession or business.

33 The failure to withhold federal or State income taxes or to pay
34 unemployment compensation contributions or workers'
35 compensation premiums with respect to an individual's wages shall
36 not be considered in making a determination under this section.

37

38 5. ²a.² An employer, or any officer, agent, superintendent,
39 foreman, or employee of the employer who fails to properly classify
40 an individual as an employee in accordance with section 4 of this
41 act, for purposes of the "New Jersey Prevailing Wage Act,"
42 P.L.1963, c.150 (C.34:11-56.25 et seq.), the "unemployment
43 compensation law," R.S.43:21-1 et seq., the "Temporary Disability
44 Benefits Law," P.L.1948, c.110 (C.43:21-25 et seq.), the "New
45 Jersey Gross Income Tax Act," N.J.S.54A:1-1 et seq., P.L.1965, c.
46 173 (C.34:11-4.1 et seq.) or other applicable State tax laws,
47 ¹[P.L.1965, c.173 (C.34:11-4.1 et seq.),]¹ ²[the]² ¹["workers'

1 compensation law,"] ²workers' compensation law,¹ R.S.34:15-1 et
2 seq.,]² and the "New Jersey State Wage and Hour Law," P.L.1966,
3 c.113 (C.34:11-56a et seq.), and fails to pay wages, benefits, taxes
4 or other contributions required by any of those acts, shall be:

5 ²[a. If the failure is done knowingly, guilty of a crime of the
6 third degree and, notwithstanding the provisions of Title 2C of the
7 New Jersey Statutes and subject to a fine of not more than \$15,000
8 or imprisonment for not more than one year for a first offense, or
9 both; and by a fine of not more than \$30,000, or imprisonment for
10 not more than two years, or both, for a subsequent offense.] (1)
11 Guilty of a disorderly persons offense and shall, upon conviction,
12 be fined not less than \$100 nor more than \$1,000 or be imprisoned
13 for not less than 10 nor more than 90 days, or both. Each week, in
14 any day of which an employee is misclassified and each employee
15 so misclassified, shall constitute a separate offense.²

16 ²[b.] (2)² If the failure is done ²recklessly,] knowingly,²
17 guilty of a crime of the ²fourth degree and, notwithstanding the
18 provisions of Title 2C of the New Jersey Statutes and subject to a
19 fine of not more than \$10,000 or imprisonment for not more than
20 six months for a first offense, or both; and by a fine of not more
21 than \$20,000, or imprisonment for not more than one year, or both,
22 for a subsequent offense.] second degree if the contract amount is
23 for \$75,000 or above; guilty of a crime of the third degree if the
24 contract amount exceeds \$2,500, but is less than \$75,000; and guilty
25 of a crime of the fourth degree if the contract amount is for \$2,500
26 or less. In addition, the violator shall be deemed to have caused
27 loss to the employees in any amount by which the employees were
28 underpaid in connection with the misclassification and shall be
29 subject to the provisions of N.J.S.2C:43-3 regarding fines and
30 restitution to victims and be subject to other pertinent provisions of
31 Title 2C of the New Jersey Statutes, including, but not limited to,
32 N.J.S.2C:43-4, 2C:43-6 and 2C:44-1.

33 b. As an alternative to or in addition to any other sanctions
34 provided by law for violations of any provision of this act, when the
35 Commissioner of Labor and Workforce Development finds that an
36 employer has violated this act, the commissioner is authorized to
37 assess and collect administrative penalties, up to a maximum of
38 \$2,500 for a first violation and up to a maximum of \$5,000 for each
39 subsequent violation, specified in a schedule of penalties to be
40 promulgated by regulation by the commissioner in accordance with
41 the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et
42 seq.). When determining the amount of the penalty imposed because
43 of a violation, the commissioner shall consider factors which
44 include the history of previous violations by the employer, the
45 seriousness of the violation, the good faith of the employer and the
46 size of the employer's business. No administrative penalty shall be
47 levied pursuant to this section unless the Commissioner of Labor

1 and Workforce Development provides the alleged violator with
2 notification of the violation and of the amount of the penalty by
3 certified mail and an opportunity to request a hearing before the
4 commissioner or his designee within 15 days following the receipt
5 of the notice. If a hearing is requested, the commissioner shall
6 issue a final order upon that hearing and a finding that a violation
7 has occurred. If no hearing is requested, the notice shall become a
8 final order upon expiration of the 15-day period. Payment of the
9 penalty is due when a final order is issued or when the notice
10 becomes a final order. Any penalty imposed pursuant to this section
11 may be recovered with costs in a summary proceeding commenced
12 by the commissioner pursuant to the "Penalty Enforcement Law of
13 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

14 c. Any sum collected as a penalty pursuant to this section shall
15 be applied toward enforcement and administration costs of the
16 Division of Workplace Standards in the Department of Labor and
17 Workforce Development.

18 d. When the Commissioner of Labor and Workforce
19 Development finds that the employer has violated provisions of this
20 act, the commissioner may refer the matter to the Attorney General
21 or his designee for investigation and prosecution. Nothing in this
22 subsection shall be deemed to limit the authority of the Attorney
23 General to investigate and prosecute violations of the New Jersey
24 Code of Criminal Justice, nor to limit the commissioner's ability to
25 refer any matter for criminal investigation or prosecution.

26 e.² A complaint ¹[or indictment]¹ ²or indictment² under the
27 provisions of ²subsection a. or subsection d. of² this section may be
28 brought ¹[either in the county in which the work was performed or
29 in the county in which the employer has a principal place of
30 business. In the case of an employer whose principal place of
31 business is outside the State, a complaint or indictment may be
32 sought in the county in which the work was performed] in Superior
33 Court in accordance with the Rules of ²[the]² Court¹ ²of the State
34 of New Jersey².

35
36 6. If the Commissioner of Labor and Workforce Development
37 determines, after investigation, that an employer or any officer,
38 agent, superintendent, foreman, or employee of the employer has
39 ²knowingly² failed to properly classify an individual as an
40 employee in accordance with section 4 of this act and failed to pay
41 required wages, benefits, taxes or other contributions, or if a final
42 conviction and disposition of a violation of this act is made
43 pursuant to section 5 of this act ²in which the violator is found to be
44 guilty of a crime of the second, third or fourth degree², then the
45 commissioner shall place the employer on a list of employers who
46 are prohibited from contracting, directly or indirectly, with any
47 public body for the construction of any public building or other

1 public work projects, or from performing any work on the same,
2 ²[for a period of two years if the failure is done recklessly and]² for
3 a period of three years ²[if the failure is done knowingly]². The
4 commissioner shall give notice by mail of that list to any public
5 body who shall request the commissioner so to do.

6 In the case of a determination by the commissioner, if the person
7 responsible denies that a failure to properly classify an employee
8 has occurred, he shall have the right to apply to the commissioner
9 for a hearing ²in accordance with the “Administrative Procedure
10 Act,” P.L.1968, c.410 (C.52:14B-1 et seq.)², which shall be
11 afforded and a decision shall be rendered within 48 hours of the
12 request for a hearing. The ¹[New Jersey] commissioner may bring
13 an action in¹ Superior Court ¹[shall have jurisdiction]¹ to enjoin or
14 invalidate any contract award made in violation of this section.

15
16 7. a. If the Commissioner of Labor and Workforce
17 Development determines, after investigation, that an employer
18 failed to properly classify an individual as an employee in
19 accordance with section 4 of this act, the commissioner ²may order
20 the immediate suspension of a contractor’s registration issued
21 pursuant to section 7 of P.L.1999, c.238 (C.34:11-56.54), if the
22 commissioner also determines that ordering an immediate
23 suspension is in the public interest, and provided that the contractor
24 is afforded an opportunity to contest the immediate suspension in
25 the following manner:

26 (1) The commissioner shall notify the contractor in writing of
27 the immediate revocation and the contractor’s rights under this
28 subsection.

29 (2) The contractor may notify the commissioner of its request
30 for an opportunity to be heard and contest the immediate suspension
31 in writing within 72 hours of its receipt of immediate suspension
32 notification.

33 (3) Within seven business days of receipt of the notification
34 from the contractor pursuant to paragraph (2) of this subsection, the
35 commissioner shall grant the contractor a hearing to contest the
36 immediate suspension. The commissioner shall permit the
37 contractor to present evidence at the hearing.

38 (4) The commissioner shall issue a written decision within five
39 business days of the hearing either upholding or reversing the
40 contractor’s immediate suspension. The decision shall include the
41 grounds for upholding or reversing the contractor’s immediate
42 suspension.

43 (5) If the contractor disagrees with the written decision, the
44 contractor may appeal the decision to the commissioner, in
45 accordance with the “Administrative Procedure Act,” P.L.1968,
46 c.410 (C.52:14B-1 et seq.).

1 **b.** If the commissioner orders the immediate suspension of a
2 contractor's registration pursuant to subsection a. of this section, the
3 violation shall have no effect on the registration of any contractor or
4 subcontractor, regardless of tier, in the contractual chain with the
5 suspended contractor.

6 **c.** For a second violation of the provisions of this act, the
7 commissioner shall issue a stop-work order requiring the cessation
8 of all business operations at every site at which the violation
9 occurred within 72 hours of that determination. The order shall
10 take effect when served upon the employer, or, for a particular
11 employer work site, when served at that worksite. The order shall
12 remain in effect until the commissioner issues an order releasing the
13 stop-work order upon finding that the employer has properly
14 classified the individual as an employee and has paid any penalty
15 assessed under this section. As a condition of release from a stop-
16 work order, the commissioner may require an employer who is
17 found to have failed to properly classify an individual as an
18 employee to file with the department periodic reports for a
19 probationary period that shall not exceed two years that demonstrate
20 the employer's continued compliance with this section. The
21 department shall promulgate rules and regulations to determine
22 filing times and report requirements.

23 **d.** For a third or any subsequent violation of the provisions of
24 this act, the commissioner² shall issue a stop-work order requiring
25 the cessation of all business operations ²of the violator² within 72
26 hours of that determination. The order shall take effect when
27 served upon the employer ²[, or, for a particular employer work
28 site, when served at that worksite]². The order shall remain in
29 effect until the commissioner issues an order releasing the stop-
30 work order upon finding that the employer has properly classified
31 the individual as an employee and has paid any penalty assessed
32 under this section. As a condition of release from a stop-work
33 order, the commissioner may require an employer who is found to
34 have failed to properly classify an individual as an employee, to file
35 with the department periodic reports for a probationary period that
36 shall not exceed two years that demonstrate the employer's
37 continued compliance with this section. The department shall
38 promulgate rules and regulations to determine filing times and
39 report requirements.

40 ²**[b.] e.**² Stop-work orders and penalty assessment orders issued
41 pursuant to this section against an employer shall be in effect
42 against any successor corporation or business entity that has one or
43 more of the same principals or officers as the employer against
44 whom the stop-work order was issued and which is engaged in the
45 same or equivalent trade or activity.

46 ²**[c.] f.**² The commissioner ²[shall] may² assess a 'civil'
47 penalty of \$5,000 per day against an employer for each day that it

1 conducts business operations that are in violation of a stop-work
2 order issued pursuant to this section.

3 ²[d.] g.² In addition to any other penalties provided for in this
4 section, the commissioner may assess against ¹[any] an¹ employer
5 a ¹civil¹ penalty of \$5,000 for each individual who the employer
6 failed to properly classify as an employee.

7 ²[e.] h.² If the employer denies that a failure to properly
8 classify an employee has occurred, the employer shall have the right
9 to apply to the commissioner to request a hearing, which shall be
10 afforded and a decision rendered within 48 hours of the request for
11 the hearing.

12 ²[f.] i.² The penalty shall be collected by the commissioner in a
13 summary proceeding in accordance with the "Penalty Enforcement
14 Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).¹

15

16 3. 8. a. No employer shall require or request that any individual
17 enter into an agreement or sign a document which results in the
18 misclassification of the individual as an independent contractor or
19 otherwise does not accurately reflect the employment relationship
20 with the employer.

21 b. An individual employed as a construction worker who has
22 not been properly classified as an employee may bring a civil action
23 for damages against the employer or any other employer who was in
24 ²[contact] contract² with the employee, for failing to properly
25 classify the employee if the employer had knowledge of the
26 misclassification. An individual representative, including a labor
27 organization, may bring the action on behalf of the individual or as
28 a class action. The court may award attorneys fees and other costs
29 of the action in addition to damages to an individual or class of
30 individuals who have not been properly classified as employees in
31 accordance with section 4 of this act.

32

33 9. It shall be unlawful for an employer or any other party to
34 discriminate in any manner or take adverse action against any
35 person in retaliation for exercising rights protected under this act.
36 Rights protected under this act include, but are not limited to: the
37 right to file a complaint or inform any person about an employer's
38 noncompliance with this act; the right to inform any person of his
39 potential rights and to assist him in asserting those rights. Any
40 person who in good faith alleges noncompliance with this act shall
41 be afforded the rights provided by this act, notwithstanding his
42 failure or the merits. Taking adverse action against a person within
43 90 days of the person's exercise of rights protected under this act
44 shall raise a rebuttable presumption of having done so in retaliation
45 for the exercise of those rights.

1 10. The provisions of this act shall be deemed to be severable
2 and if any section, subsection, paragraph, sentence or other part of
3 this act is declared to be unconstitutional, or the applicability
4 thereof to any person is held invalid, the remainder of this act shall
5 not thereby be deemed to be unconstitutional or invalid.

6
7 11. The commissioner shall, pursuant to the Administrative
8 Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), make and
9 promulgate rules and regulations necessary to implement the
10 purposes of this act.

11
12 12. This act shall take effect immediately.

13

14

15

16

17 Debars certain employers from public work and establishes
18 criminal penalties for misclassification of construction workers as
19 independent contractors.

ASSEMBLY, No. 4009

STATE OF NEW JERSEY 212th LEGISLATURE

INTRODUCED FEBRUARY 22, 2007

Sponsored by:

Assemblyman WILFREDO CARABALLO

District 29 (Essex and Union)

Assemblyman JOSEPH V. EGAN

District 17 (Middlesex and Somerset)

Assemblyman JOHN J. BURZICHELLI

District 3 (Salem, Cumberland and Gloucester)

Assemblyman JEFF VAN DREW

District 1 (Cape May, Atlantic and Cumberland)

SYNOPSIS

Debars certain employers from public work and establishes criminal penalties for misclassification of construction workers as independent contractors.

CURRENT VERSION OF TEXT

As introduced.



(Sponsorship Updated As Of: 2/27/2007)

1 AN ACT concerning the classification of construction employees for
2 certain purposes and supplementing Title 34 of the Revised
3 Statutes.

4

5 **BE IT ENACTED** *by the Senate and General Assembly of the State*
6 *of New Jersey:*

7

8 1. This act shall be known and may be cited as the
9 "Construction Industry Independent Contractor Act."

10

11 2. The Legislature finds that employers in the construction
12 industry who improperly classify employees as independent
13 contractors deprive these workers of proper Social Security
14 benefits, workers' compensation and other benefits, while reducing
15 the employers' State and federal tax withholdings and related
16 obligations. Moreover, this practice puts businesses at a
17 competitive disadvantage that bear higher costs for complying with
18 the law.

19

20 3. For purposes of this act:

21 "Employer" means a partnership, association, joint stock
22 company, trust, corporation, or other legal business entity or
23 successor thereof who is primarily engaged in the business of, or
24 enters into a contract for, making improvements to real property and
25 includes any subcontractor or lower tier contractor.

26 "Public body" means the State of New Jersey, any of its political
27 subdivisions, any authority created by the Legislature of the State of
28 New Jersey and any instrumentality or agency of the State of New
29 Jersey or of any of its political subdivisions.

30 "Public work" means construction, reconstruction, demolition,
31 alteration, custom fabrication, or repair work, or maintenance work,
32 including painting and decorating, done under contract and paid for
33 in whole or in part out of the funds of a public body, except work
34 performed under a rehabilitation program. "Public work" shall also
35 mean construction, reconstruction, demolition, alteration, custom
36 fabrication, or repair work, done on any property or premises,
37 whether or not the work is paid for from public funds, if, at the time
38 of the entering into of the contract:

39 (a) Not less than 55% of the property or premises is leased by a
40 public body, or is subject to an agreement to be subsequently leased
41 by the public body; and

42 (b) The portion of the property or premises that is leased or
43 subject to an agreement to be subsequently leased by the public
44 body measures more than 20,000 square feet.

45

46 4. For purposes of the "New Jersey Prevailing Wage Act,"
47 P.L.1963, c.150 (C.34:11-56.25 et seq.), the "unemployment
48 compensation law," R.S.43:21-1 et seq., the "Temporary Disability

1 Benefits Law," P.L.1948, c.110 (C.43:21-25 et seq.), the "New
2 Jersey Gross Income Tax Act," N.J.S.54A:1-1 et seq., or other
3 applicable State tax laws, P.L.1965, c.173 (C.34:11-4.1 et seq.), the
4 workers' compensation law, R.S.34:15-1 et seq., and the "New
5 Jersey State Wage and Hour Law," P.L.1966, c.113 (C.34:11-56a et
6 seq.), services performed in the making of improvements to real
7 property by an individual for remuneration paid by an employer
8 shall be deemed to be employment unless and until it is shown to
9 the satisfaction of the Department of Labor and Workforce
10 Development that:

11 a. the individual has been and will continue to be free from
12 control or direction over the performance of that service, both under
13 his contract of service and in fact; and

14 b. the service is either outside the usual course of the business
15 for which the service is performed, or the service is performed
16 outside of all the places of business of the employer for which the
17 service is performed; and

18 c. the individual is customarily engaged in an independently
19 established trade, occupation, profession or business.

20 The failure to withhold federal or State income taxes or to pay
21 unemployment compensation contributions or workers'
22 compensation premiums with respect to an individual's wages shall
23 not be considered in making a determination under this section.
24

25 5. An employer, or any officer, agent, superintendent, foreman,
26 or employee of the employer who fails to properly classify an
27 individual as an employee in accordance with section 4 of this act,
28 for purposes of the "New Jersey Prevailing Wage Act," P.L.1963,
29 c.150 (C.34:11-56.25 et seq.), the "unemployment compensation
30 law," R.S.43:21-1 et seq., the "Temporary Disability Benefits Law,"
31 P.L.1948, c.110 (C.43:21-25 et seq.), the "New Jersey Gross
32 Income Tax Act," N.J.S.54A:1-1 et seq., P.L.1965, c. 173 (C.34:11-
33 4.1 et seq.) or other applicable State tax laws, P.L.1965, c.173
34 (C.34:11-4.1 et seq.), the "workers' compensation law," R.S.34:15-
35 1 et seq., and the "New Jersey State Wage and Hour Law,"
36 P.L.1966, c.113 (C.34:11-56a et seq.), and fails to pay wages,
37 benefits, taxes or other contributions required by any of those acts,
38 shall be:

39 a. If the failure is done knowingly, guilty of a crime of the
40 third degree and, notwithstanding the provisions of Title 2C of the
41 New Jersey Statutes and subject to a fine of not more than \$15,000
42 or imprisonment for not more than one year for a first offense, or
43 both; and by a fine of not more than \$30,000, or imprisonment for
44 not more than two years, or both, for a subsequent offense.

45 b. If the failure is done recklessly, guilty of a crime of the
46 fourth degree and, notwithstanding the provisions of Title 2C of the
47 New Jersey Statutes and subject to a fine of not more than \$10,000
48 or imprisonment for not more than six months for a first offense, or

1 both; and by a fine of not more than \$20,000, or imprisonment for
2 not more than one year, or both, for a subsequent offense.

3 A complaint or indictment under the provisions of this section
4 may be brought either in the county in which the work was
5 performed or in the county in which the employer has a principal
6 place of business. In the case of an employer whose principal place
7 of business is outside the State, a complaint or indictment may be
8 sought in the county in which the work was performed.

9
10 6. If the Commissioner of Labor and Workforce Development
11 determines, after investigation, that an employer or any officer,
12 agent, superintendent, foreman, or employee of the employer has
13 failed to properly classify an individual as an employee in
14 accordance with section 4 of this act and failed to pay required
15 wages, benefits, taxes or other contributions, or if a final conviction
16 and disposition of a violation of this act is made pursuant to section
17 5 of this act, then the commissioner shall place the employer on a
18 list of employers who are prohibited from contracting, directly or
19 indirectly, with any public body for the construction of any public
20 building or other public work projects, or from performing any
21 work on the same, for a period of two years if the failure is done
22 recklessly and for a period of three years if the failure is done
23 knowingly. The commissioner shall give notice by mail of that list
24 to any public body who shall request the commissioner so to do.

25 In the case of a determination by the commissioner, if the person
26 responsible denies that a failure to properly classify an employee
27 has occurred, he shall have the right to apply to the commissioner
28 for a hearing, which shall be afforded and a decision shall be
29 rendered within 48 hours of the request for a hearing. The New
30 Jersey Superior Court shall have jurisdiction to enjoin or invalidate
31 any contract award made in violation of this section.

32
33 7. a. If the Commissioner of Labor and Workforce
34 Development determines, after investigation, that an employer
35 failed to properly classify an individual as an employee in
36 accordance with section 4 of this act, the commissioner shall issue a
37 stop-work order requiring the cessation of all business operations
38 within 72 hours of that determination. The order shall take effect
39 when served upon the employer, or, for a particular employer work
40 site, when served at that worksite. The order shall remain in effect
41 until the commissioner issues an order releasing the stop-work order
42 upon finding that the employer has properly classified the
43 individual as an employee and has paid any penalty assessed under
44 this section. As a condition of release from a stop-work order, the
45 commissioner may require an employer who is found to have failed
46 to properly classify an individual as an employee, to file with the
47 department periodic reports for a probationary period that shall not
48 exceed two years that demonstrate the employer's continued

1 compliance with this section. The department shall promulgate
2 rules and regulations to determine filing times and report
3 requirements.

4 b. Stop-work orders and penalty assessment orders issued
5 pursuant to this section against an employer shall be in effect
6 against any successor corporation or business entity that has one or
7 more of the same principals or officers as the employer against
8 whom the stop-work order was issued and which is engaged in the
9 same or equivalent trade or activity.

10 c. The commissioner shall assess a penalty of \$5,000 per day
11 against an employer for each day that it conducts business
12 operations that are in violation of a stop-work order issued pursuant
13 to this section.

14 d. In addition to any other penalties provided for in this
15 section, the commissioner may assess against any employer a
16 penalty of \$5,000 for each individual who the employer failed to
17 properly classify as an employee.

18 e. If the employer denies that a failure to properly classify an
19 employee has occurred, the employer shall have the right to apply
20 to the commissioner to request a hearing, which shall be afforded
21 and a decision rendered within 48 hours of the request for the
22 hearing.

23

24 8. a. No employer shall require or request that any individual
25 enter into an agreement or sign a document which results in the
26 misclassification of the individual as an independent contractor or
27 otherwise does not accurately reflect the employment relationship
28 with the employer.

29 b. An individual employed as a construction worker who has
30 not been properly classified as an employee may bring a civil action
31 for damages against the employer or any other employer who was in
32 contact with the employee, for failing to properly classify the
33 employee if the employer had knowledge of the misclassification.
34 An individual representative, including a labor organization, may
35 bring the action on behalf of the individual or as a class action. The
36 court may award attorneys fees and other costs of the action in
37 addition to damages to an individual or class of individuals who
38 have not been properly classified as employees in accordance with
39 section 4 of this act.

40

41 9. It shall be unlawful for an employer or any other party to
42 discriminate in any manner or take adverse action against any
43 person in retaliation for exercising rights protected under this act.
44 Rights protected under this act include, but are not limited to: the
45 right to file a complaint or inform any person about an employer's
46 noncompliance with this act; the right to inform any person of his
47 potential rights and to assist him in asserting those rights. Any
48 person who in good faith alleges noncompliance with this act shall

1 be afforded the rights provided by this act, notwithstanding his
2 failure or the merits. Taking adverse action against a person within
3 90 days of the person's exercise of rights protected under this act
4 shall raise a rebuttable presumption of having done so in retaliation
5 for the exercise of those rights.

6
7 10. The provisions of this act shall be deemed to be severable
8 and if any section, subsection, paragraph, sentence or other part of
9 this act is declared to be unconstitutional, or the applicability
10 thereof to any person is held invalid, the remainder of this act shall
11 not thereby be deemed to be unconstitutional or invalid.

12
13 11. The commissioner shall, pursuant to the Administrative
14 Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), make and
15 promulgate rules and regulations necessary to implement the
16 purposes of this act.

17
18 12. This act shall take effect immediately.

19
20
21 STATEMENT

22
23 Employers who improperly classify employees as independent
24 contractors in the construction industry deprive workers of proper
25 Social Security benefits, workers compensation insurance and other
26 benefits, which also reduce employers' State and federal tax
27 withholding and related obligations. These practices put those
28 employers in the construction industry who bear the higher costs of
29 complying with the law at a competitive disadvantage. In this way,
30 independent contractor misclassification undermines fair market
31 competition in the construction industry.

32 This bill creates a presumption that a work arrangement in the
33 construction industry is an employer-employee relationship unless
34 the party receiving the services can overcome the legal presumption
35 of employment by establishing that three factors are present. An
36 employer subject to the bill who fails to properly classify an
37 individual as an employee and instead classifies him as an
38 independent contractor will be subject to criminal penalties.

39 An employer violates the provisions of the bill if it classifies or
40 treats a worker who does not meet each prong of the three pronged
41 test as an independent contractor. Thus, the bill penalizes any
42 employer, or any officer, agent, superintendent, foreman, or
43 employee of the employer who fails to properly classify an
44 individual as an employee and instead classifies them as an
45 independent contractor.

46 Employers who misclassify individuals as independent
47 contractors for purposes of avoiding relevant provisions of the
48 "New Jersey Prevailing Wage Act," the "unemployment

1 compensation law," the "Temporary Disability Benefits Law," the
2 "New Jersey Gross Income Tax Act," the "workers' compensation
3 law," or "New Jersey State Wage and Hour Law," will be, if the
4 misclassification is done knowingly, guilty of a crime of the third
5 degree and be punished by a fine of not more than \$15,000 or
6 imprisonment for not more than one year for a first offense, or both,
7 and by a fine of not more than \$30,000, or imprisonment for not
8 more than two years, or both, for a subsequent willful offense, and
9 if the misclassification is done recklessly, of a crime of the fourth
10 degree and punished by a fine of not more than \$10,000, or
11 imprisonment for not more than six months for a first offense, or
12 both, and by a fine of not more than \$20,000 or imprisonment for
13 not more than one year, or both for a subsequent offense.

14 The bill requires the Commissioner of Labor and Workforce
15 Development to prevent an employer who, after investigation has
16 failed to properly classify an individual from contracting, directly
17 or indirectly, with the State or any of its agencies, authorities or
18 political subdivisions for the construction of any public building or
19 other public works, or from performing any work on the same, for a
20 period of three years for a knowing violation or up to two years for
21 a reckless violation.

22 The bill authorizes the Commissioner of Labor and Workforce
23 Development after investigation, to issue a stop-work order against
24 an employer who has failed to properly classify an individual and
25 permits an individual who has been misclassified to institute a civil
26 action against the employer.

27 Finally, the bill makes it unlawful for an employer or any other
28 party to discriminate in any manner or take adverse action against
29 any person in retaliation for exercising rights protected under the
30 bill. These rights include the right to file a complaint or inform any
31 person about an employer's noncompliance with this act; the right to
32 inform any person of his potential rights and to assist him in
33 asserting such rights.

ASSEMBLY LABOR COMMITTEE

STATEMENT TO

ASSEMBLY, No. 4009

with committee amendments

STATE OF NEW JERSEY

DATED: FEBRUARY 26, 2007

The Assembly Labor Committee reports favorably and with committee amendments Assembly Bill No. 4009.

This bill creates a presumption that a work arrangement in the construction industry is an employer-employee relationship unless the party receiving the services can overcome the legal presumption of employment. Under the bill, services performed in the making of improvements to real property by an individual for remuneration are deemed to be employment unless and until it is shown to the satisfaction of the Department of Labor and Workforce Development that:

1. The individual has been and will continue to be free from control or direction over the performance of that service, both under his contract of service and in fact;
2. The service is either outside the usual course of the business for which the service is performed, or the service is performed outside of all the places of business of the employer for which the service is performed; and
3. The individual is customarily engaged in an independently established trade, occupation, profession or business.

An employer subject to the bill who fails to properly classify an individual as an employee and instead classifies him as an independent contractor will be subject to criminal penalties.

An employer violates the provisions of the bill if it classifies or treats a worker who does not meet all three prongs of the three pronged test as an independent contractor. Thus, the bill penalizes any employer, or any officer, agent, superintendent, foreman, or employee of the employer who fails to properly classify an individual in the construction industry as an employee and instead classifies them as an independent contractor.

Employers who misclassify individuals in the construction industry as independent contractors for purposes of avoiding relevant provisions of the "New Jersey Prevailing Wage Act," the "unemployment compensation law," the "Temporary Disability Benefits Law," the "New Jersey Gross Income Tax Act," the workers' compensation law, or "New Jersey State Wage and Hour Law," will

be, if the misclassification is done knowingly, guilty of a crime of the third degree and be punished by a fine of not more than \$15,000 or imprisonment for not more than one year for a first offense, or both, and by a fine of not more than \$30,000, or imprisonment for not more than two years, or both, for a subsequent willful offense, and, if the misclassification is done recklessly, of a crime of the fourth degree and punished by a fine of not more than \$10,000, or imprisonment for not more than six months for a first offense, or both, and by a fine of not more than \$20,000 or imprisonment for not more than one year, or both, for a subsequent offense.

The bill requires the Commissioner, of Labor and Workforce Development, upon finding that a contractor has misclassified an employee, to bar the contractor from contracting, directly or indirectly, with the State or any of its agencies, authorities or political subdivisions for the construction of any public building or other public works, or from performing any work on the same, for a period of three years for a knowing violation or up to two years for a reckless violation. The commissioner is authorized by the bill to bring an action to enjoin or invalidate a contract made in violation of a debarment made under the bill.

The bill requires the commissioner, after investigation, to issue a stop-work order against an employer who has failed to properly classify an individual, requires the commissioner to assess civil penalties on an employer who violates a stop work order, and permits an individual who has been misclassified or the commissioner to institute a civil action against the employer.

Finally, the bill makes it unlawful for an employer or any other party to discriminate in any manner or take adverse action against any person in retaliation for exercising rights protected under the bill. These rights include the right to file a complaint or inform any person about an employer's noncompliance with this act; the right to inform any person of his potential rights; and the right to assist him in asserting such rights.

COMMITTEE AMENDMENTS

The amendments adopted by the committee clarify that it is the Commissioner of Labor and Workforce Development who may bring an action to enjoin or invalidate a contract made in violation of a debarment made under the bill. The amendments remove from the bill specifications that a complaint be brought in a county where the work is performed or the principal place of business is located, and instead specify that the complaint be brought in Superior Court in accordance with the Rules of Court. The amendments also specify that it is the commissioner who collects civil penalties for violations of stop-work orders, and requires that all penalty collection by the commissioner be conducted in a summary proceedings in accordance with the "Penalty Enforcement law of 1999, "P.L.1999, c.274 (C.2A:58-10 et seq.).

STATEMENT TO
[First Reprint]
ASSEMBLY, No. 4009

with Assembly Floor Amendments
(Proposed by Assemblyman CARABALLO)

ADOPTED: MARCH 15, 2007

These Assembly amendments revise the penalties and enforcement procedures for violations of the bill's prohibition against the misclassification of construction employees as independent contractors and remove the bill's applicability to misclassification for the purposes of workers' compensation.

The amendments revise the criminal penalties provided for violations of the provisions of the bill to provide that any knowing violation is a crime of the second degree if the contract is for \$75,000 or more, a crime of the third degree if the contract is for between \$2,500 and \$75,000, and a crime of the fourth degree if the contract is for \$2,500 or less. These criminal penalties are identical to the criminal penalties provided in section 97 of P.L.1999, c.440 (C.2C:21-34) for a knowing failure to pay the wages required under the prevailing wage law. The amendments provide that in any violation of the bill, even a violation which is not done knowingly or willfully, the violator is guilty of a disorderly persons offense, and may, in addition, be subject to administrative penalties of up to \$2,500 for a first violation and up to \$5,000 for each subsequent violation.

The amendments provide that the bill's requirement that the Commissioner of Labor and Workforce Development issue a stop work order for a violation of the act apply only to second and subsequent violations of the act. Under the amendments, a stop work order would apply only to the worksites at which a second violation occurs and to all worksites of the violator for a third or subsequent violation. They provide the commissioner the option, for any violation, of suspending the registration of a contractor pending a hearing. The amendments provide that the commissioner has the authority to assess civil penalties for non-compliance with the stop work orders, but is not required to do so.

The amendments specify that debarment from public works contracting would only apply to cases of violations done knowingly and that debarment would be for three years and remove the provision that debarment be for two years if the violation is done recklessly.

SENATE, No. 2579

STATE OF NEW JERSEY 212th LEGISLATURE

INTRODUCED MARCH 5, 2007

Sponsored by:

Senator ELLEN KARCHER

District 12 (Mercer and Monmouth)

Senator RICHARD J. CODEY

District 27 (Essex)

SYNOPSIS

Debars certain employers from public work and establishes criminal penalties for misclassification of construction workers as independent contractors.

CURRENT VERSION OF TEXT

As introduced.



S2579 KARCHER, CODEY

2

1 AN ACT concerning the classification of construction employees for
2 certain purposes and supplementing Title 34 of the Revised
3 Statutes.

4

5 **BE IT ENACTED** by the Senate and General Assembly of the State
6 of New Jersey:

7

8 1. This act shall be known and may be cited as the
9 "Construction Industry Independent Contractor Act."

10

11 2. The Legislature finds that employers in the construction
12 industry who improperly classify employees as independent
13 contractors deprive these workers of proper Social Security
14 benefits, workers' compensation and other benefits, while reducing
15 the employers' State and federal tax withholdings and related
16 obligations. Moreover, this practice puts businesses at a
17 competitive disadvantage that bear higher costs for complying with
18 the law.

19

20 3. For purposes of this act:

21 "Employer" means a partnership, association, joint stock
22 company, trust, corporation, or other legal business entity or
23 successor thereof who is primarily engaged in the business of, or
24 enters into a contract for, making improvements to real property and
25 includes any subcontractor or lower tier contractor.

26 "Public body" means the State of New Jersey, any of its political
27 subdivisions, any authority created by the Legislature of the State of
28 New Jersey and any instrumentality or agency of the State of New
29 Jersey or of any of its political subdivisions.

30 "Public work" means construction, reconstruction, demolition,
31 alteration, custom fabrication, or repair work, or maintenance work,
32 including painting and decorating, done under contract and paid for
33 in whole or in part out of the funds of a public body, except work
34 performed under a rehabilitation program. "Public work" shall also
35 mean construction, reconstruction, demolition, alteration, custom
36 fabrication, or repair work, done on any property or premises,
37 whether or not the work is paid for from public funds, if, at the time
38 of the entering into of the contract:

39 (a) Not less than 55% of the property or premises is leased by a
40 public body, or is subject to an agreement to be subsequently leased
41 by the public body; and

42 (b) The portion of the property or premises that is leased or
43 subject to an agreement to be subsequently leased by the public
44 body measures more than 20,000 square feet.

45

46 4. For purposes of the "New Jersey Prevailing Wage Act,"
47 P.L.1963, c.150 (C.34:11-56.25 et seq.), the "unemployment
48 compensation law," R.S.43:21-1 et seq., the "Temporary Disability

1 Benefits Law," P.L.1948, c.110 (C.43:21-25 et seq.), the "New
2 Jersey Gross Income Tax Act," N.J.S.54A:1-1 et seq., or other
3 applicable State tax laws, P.L.1965, c.173 (C.34:11-4.1 et seq.), the
4 workers' compensation law, R.S.34:15-1 et seq., and the "New
5 Jersey State Wage and Hour Law," P.L.1966, c.113 (C.34:11-56a et
6 seq.), services performed in the making of improvements to real
7 property by an individual for remuneration paid by an employer
8 shall be deemed to be employment unless and until it is shown to
9 the satisfaction of the Department of Labor and Workforce
10 Development that:

11 a. the individual has been and will continue to be free from
12 control or direction over the performance of that service, both under
13 his contract of service and in fact; and

14 b. the service is either outside the usual course of the business
15 for which the service is performed, or the service is performed
16 outside of all the places of business of the employer for which the
17 service is performed; and

18 c. the individual is customarily engaged in an independently
19 established trade, occupation, profession or business.

20 The failure to withhold federal or State income taxes or to pay
21 unemployment compensation contributions or workers'
22 compensation premiums with respect to an individual's wages shall
23 not be considered in making a determination under this section.
24

25 5. An employer, or any officer, agent, superintendent, foreman,
26 or employee of the employer who fails to properly classify an
27 individual as an employee in accordance with section 4 of this act,
28 for purposes of the "New Jersey Prevailing Wage Act," P.L.1963,
29 c.150 (C.34:11-56.25 et seq.), the "unemployment compensation
30 law," R.S.43:21-1 et seq., the "Temporary Disability Benefits Law,"
31 P.L.1948, c.110 (C.43:21-25 et seq.), the "New Jersey Gross
32 Income Tax Act," N.J.S.54A:1-1 et seq., P.L.1965, c. 173 (C.34:11-
33 4.1 et seq.) or other applicable State tax laws, P.L.1965, c.173
34 (C.34:11-4.1 et seq.), the "workers' compensation law," R.S.34:15-
35 1 et seq., and the "New Jersey State Wage and Hour Law,"
36 P.L.1966, c.113 (C.34:11-56a et seq.), and fails to pay wages,
37 benefits, taxes or other contributions required by any of those acts,
38 shall be:

39 a. If the failure is done knowingly, guilty of a crime of the
40 third degree and, notwithstanding the provisions of Title 2C of the
41 New Jersey Statutes and subject to a fine of not more than \$15,000
42 or imprisonment for not more than one year for a first offense, or
43 both; and by a fine of not more than \$30,000, or imprisonment for
44 not more than two years, or both, for a subsequent offense.

45 b. If the failure is done recklessly, guilty of a crime of the
46 fourth degree and, notwithstanding the provisions of Title 2C of the
47 New Jersey Statutes and subject to a fine of not more than \$10,000
48 or imprisonment for not more than six months for a first offense, or

S2579 KARCHER, CODEY

1 both; and by a fine of not more than \$20,000, or imprisonment for
2 not more than one year, or both, for a subsequent offense.

3 A complaint or indictment under the provisions of this section
4 may be brought either in the county in which the work was
5 performed or in the county in which the employer has a principal
6 place of business. In the case of an employer whose principal place
7 of business is outside the State, a complaint or indictment may be
8 sought in the county in which the work was performed.

9
10 6. If the Commissioner of Labor and Workforce Development
11 determines, after investigation, that an employer or any officer,
12 agent, superintendent, foreman, or employee of the employer has
13 failed to properly classify an individual as an employee in
14 accordance with section 4 of this act and failed to pay required
15 wages, benefits, taxes or other contributions, or if a final conviction
16 and disposition of a violation of this act is made pursuant to section
17 5 of this act, then the commissioner shall place the employer on a
18 list of employers who are prohibited from contracting, directly or
19 indirectly, with any public body for the construction of any public
20 building or other public work projects, or from performing any
21 work on the same, for a period of two years if the failure is done
22 recklessly and for a period of three years if the failure is done
23 knowingly. The commissioner shall give notice by mail of that list
24 to any public body who shall request the commissioner so to do.

25 In the case of a determination by the commissioner, if the person
26 responsible denies that a failure to properly classify an employee
27 has occurred, he shall have the right to apply to the commissioner
28 for a hearing, which shall be afforded and a decision shall be
29 rendered within 48 hours of the request for a hearing. The New
30 Jersey Superior Court shall have jurisdiction to enjoin or invalidate
31 any contract award made in violation of this section.

32
33 7. a. If the Commissioner of Labor and Workforce
34 Development determines, after investigation, that an employer
35 failed to properly classify an individual as an employee in
36 accordance with section 4 of this act, the commissioner shall issue a
37 stop-work order requiring the cessation of all business operations
38 within 72 hours of that determination. The order shall take effect
39 when served upon the employer, or, for a particular employer work
40 site, when served at that worksite. The order shall remain in effect
41 until the commissioner issues an order releasing the stop-work order
42 upon finding that the employer has properly classified the
43 individual as an employee and has paid any penalty assessed under
44 this section. As a condition of release from a stop-work order, the
45 commissioner may require an employer who is found to have failed
46 to properly classify an individual as an employee, to file with the
47 department periodic reports for a probationary period that shall not
48 exceed two years that demonstrate the employer's continued

1 compliance with this section. The department shall promulgate
2 rules and regulations to determine filing times and report
3 requirements.

4 b. Stop-work orders and penalty assessment orders issued
5 pursuant to this section against an employer shall be in effect
6 against any successor corporation or business entity that has one or
7 more of the same principals or officers as the employer against
8 whom the stop-work order was issued and which is engaged in the
9 same or equivalent trade or activity.

10 c. The commissioner shall assess a penalty of \$5,000 per day
11 against an employer for each day that it conducts business
12 operations that are in violation of a stop-work order issued pursuant
13 to this section.

14 d. In addition to any other penalties provided for in this
15 section, the commissioner may assess against any employer a
16 penalty of \$5,000 for each individual who the employer failed to
17 properly classify as an employee.

18 e. If the employer denies that a failure to properly classify an
19 employee has occurred, the employer shall have the right to apply
20 to the commissioner to request a hearing, which shall be afforded
21 and a decision rendered within 48 hours of the request for the
22 hearing.

23

24 8. a. No employer shall require or request that any individual
25 enter into an agreement or sign a document which results in the
26 misclassification of the individual as an independent contractor or
27 otherwise does not accurately reflect the employment relationship
28 with the employer.

29 b. An individual employed as a construction worker who has
30 not been properly classified as an employee may bring a civil action
31 for damages against the employer or any other employer who was in
32 contact with the employee, for failing to properly classify the
33 employee if the employer had knowledge of the misclassification.
34 An individual representative, including a labor organization, may
35 bring the action on behalf of the individual or as a class action. The
36 court may award attorneys fees and other costs of the action in
37 addition to damages to an individual or class of individuals who
38 have not been properly classified as employees in accordance with
39 section 4 of this act.

40

41 9. It shall be unlawful for an employer or any other party to
42 discriminate in any manner or take adverse action against any
43 person in retaliation for exercising rights protected under this act.
44 Rights protected under this act include, but are not limited to: the
45 right to file a complaint or inform any person about an employer's
46 noncompliance with this act; the right to inform any person of his
47 potential rights and to assist him in asserting those rights. Any
48 person who in good faith alleges noncompliance with this act shall

1 be afforded the rights provided by this act, notwithstanding his
2 failure or the merits. Taking adverse action against a person within
3 90 days of the person's exercise of rights protected under this act
4 shall raise a rebuttable presumption of having done so in retaliation
5 for the exercise of those rights.

6
7 10. The provisions of this act shall be deemed to be severable
8 and if any section, subsection, paragraph, sentence or other part of
9 this act is declared to be unconstitutional, or the applicability
10 thereof to any person is held invalid, the remainder of this act shall
11 not thereby be deemed to be unconstitutional or invalid.

12
13 11. The commissioner shall, pursuant to the Administrative
14 Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), make and
15 promulgate rules and regulations necessary to implement the
16 purposes of this act.

17
18 12. This act shall take effect immediately.

19
20

21 STATEMENT

22

23 Employers who improperly classify employees as independent
24 contractors in the construction industry deprive workers of proper
25 Social Security benefits, workers compensation insurance and other
26 benefits, which also reduce employers' State and federal tax
27 withholding and related obligations. These practices put those
28 employers in the construction industry who bear the higher costs of
29 complying with the law at a competitive disadvantage. In this way,
30 independent contractor misclassification undermines fair market
31 competition in the construction industry.

32 This bill creates a presumption that a work arrangement in the
33 construction industry is an employer-employee relationship unless
34 the party receiving the services can overcome the legal presumption
35 of employment by establishing that three factors are present. An
36 employer subject to the bill who fails to properly classify an
37 individual as an employee and instead classifies him as an
38 independent contractor will be subject to criminal penalties.

39 An employer violates the provisions of the bill if it classifies or
40 treats a worker who does not meet each prong of the three pronged
41 test as an independent contractor. Thus, the bill penalizes any
42 employer, or any officer, agent, superintendent, foreman, or
43 employee of the employer who fails to properly classify an
44 individual as an employee and instead classifies them as an
45 independent contractor.

46 Employers who misclassify individuals as independent
47 contractors for purposes of avoiding relevant provisions of the
48 "New Jersey Prevailing Wage Act," the "unemployment

1 compensation law," the "Temporary Disability Benefits Law," the
2 "New Jersey Gross Income Tax Act," the "workers' compensation
3 law," or "New Jersey State Wage and Hour Law," will be, if the
4 misclassification is done knowingly, guilty of a crime of the third
5 degree and be punished by a fine of not more than \$15,000 or
6 imprisonment for not more than one year for a first offense, or both,
7 and by a fine of not more than \$30,000, or imprisonment for not
8 more than two years, or both, for a subsequent willful offense, and
9 if the misclassification is done recklessly, of a crime of the fourth
10 degree and punished by a fine of not more than \$10,000, or
11 imprisonment for not more than six months for a first offense, or
12 both, and by a fine of not more than \$20,000 or imprisonment for
13 not more than one year, or both for a subsequent offense.

14 The bill requires the Commissioner of Labor and Workforce
15 Development to prevent an employer who, after investigation has
16 failed to properly classify an individual from contracting, directly
17 or indirectly, with the State or any of its agencies, authorities or
18 political subdivisions for the construction of any public building or
19 other public works, or from performing any work on the same, for a
20 period of three years for a knowing violation or up to two years for
21 a reckless violation.

22 The bill authorizes the Commissioner of Labor and Workforce
23 Development after investigation, to issue a stop-work order against
24 an employer who has failed to properly classify an individual and
25 permits an individual who has been misclassified to institute a civil
26 action against the employer.

27 Finally, the bill makes it unlawful for an employer or any other
28 party to discriminate in any manner or take adverse action against
29 any person in retaliation for exercising rights protected under the
30 bill. These rights include the right to file a complaint or inform any
31 person about an employer's noncompliance with this act; the right to
32 inform any person of his potential rights and to assist him in
33 asserting such rights.

SENATE, No. 2248

STATE OF NEW JERSEY
212th LEGISLATURE

INTRODUCED OCTOBER 16, 2006

Sponsored by:

Senator STEPHEN M. SWEENEY

District 3 (Salem, Cumberland and Gloucester)

SYNOPSIS

Establishes criminal penalties and debars certain employers from public work for misclassifying construction workers as independent contractors.

CURRENT VERSION OF TEXT

As introduced.



1 AN ACT concerning the classification of certain employees as
2 independent contractors and supplementing Title 34 of the
3 Revised Statutes.

4
5 **BE IT ENACTED** by the Senate and General Assembly of the State
6 of New Jersey:

7
8 1. For purposes of this act:

9 "Employer" means a person, partnership, association, joint stock
10 company, trust, corporation, or other legal business entity or
11 successor thereof who is engaged in the business of, or enters into a
12 contract for, making improvements to real property and includes
13 any subcontractor or lower tier contractor.

14 "Public body" means the State of New Jersey, any of its political
15 subdivisions, any authority created by the Legislature of the State of
16 New Jersey and any instrumentality or agency of the State of New
17 Jersey or of any of its political subdivisions.

18 "Public work" means construction, reconstruction, demolition,
19 alteration, custom fabrication, or repair work, or maintenance work,
20 including painting and decorating, done under contract and paid for
21 in whole or in part out of the funds of a public body, except work
22 performed under a rehabilitation program. "Public work" shall also
23 mean construction, reconstruction, demolition, alteration, custom
24 fabrication, or repair work, done on any property or premises,
25 whether or not the work is paid for from public funds, if, at the time
26 of the entering into of the contract:

27 (a) Not less than 55% of the property or premises is leased by a
28 public body, or is subject to an agreement to be subsequently leased
29 by the public body; and

30 (b) The portion of the property or premises that is leased or
31 subject to an agreement to be subsequently leased by the public
32 body measures more than 20,000 square feet.

33
34 2. For purposes of the "New Jersey Prevailing Wage Act,"
35 P.L.1963, c.150 (C.34:11-56.25 et seq.), the "unemployment
36 compensation law," R.S.43:21-1 et seq., the "Temporary Disability
37 Benefits Law," P.L.1948, c.110 (C.43:21-25 et seq.), the "New
38 Jersey Gross Income Tax Act," N.J.S.54A:1-1 et seq., or other
39 applicable State tax laws, P.L.1965, c.173 (C.34:11-4.1 et seq.), the
40 "workers' compensation law," R.S.34:15-1 et seq., and the "New
41 Jersey State Wage and Hour Law," P.L.1966, c.113 (C.34:11-56a et
42 seq.), services performed in the making of improvements to real
43 property by an individual for remuneration paid by an employer,
44 directly or indirectly through any staffing agency, temporary help
45 services firm, employee leasing company, employment agency or
46 similar entity, shall be deemed to be employment unless and until it
47 is shown to the satisfaction of the Department of Labor and
48 Workforce Development that:

1 a. the individual has been and will continue to be free from
2 control or direction over the performance of that service, both under
3 his contract of service and in fact; and

4 b. the service is either outside the usual course of the business
5 for which the service is performed, or the service is performed
6 outside of all the places of business of the employer for which the
7 service is performed; and

8 c. the individual is customarily engaged in an independently
9 established trade, occupation, profession or business.

10 The failure to withhold federal or State income taxes or to pay
11 unemployment compensation contributions or workers'
12 compensation premiums with respect to an individual's wages shall
13 not be considered in making a determination under this section.
14

15 3. An employer, or any officer, agent, superintendent, foreman,
16 or employee of the employer, or staffing agency or temporary help
17 services firm, employee leasing company, employment agency or
18 similar entity used by the employer, who fails to properly classify
19 an individual as an employee in accordance with section 2 of this
20 act, for purposes of the "New Jersey Prevailing Wage Act,"
21 P.L.1963, c.150 (C.34:11-56.25 et seq.), the "unemployment
22 compensation law," R.S.43:21-1 et seq., the "Temporary Disability
23 Benefits Law," P.L.1948, c.110 (C.43:21-25 et seq.), the "New
24 Jersey Gross Income Tax Act," N.J.S.54A:1-1 et seq., P.L.1965, c.
25 173 (C.34:11-4.1 et seq.) or other applicable State tax laws,
26 P.L.1965, c.173 (C.34:11-4.1 et seq.), the "workers' compensation
27 law," R.S.34:15-1 et seq., and the "New Jersey State Wage and
28 Hour Law," P.L.1966, c.113 (C.34:11-56a et seq.), and fails to pay
29 wages, benefits, taxes or other contributions required by any of
30 those acts, shall be:

31 a. If the failure is done knowingly, guilty of a crime of the third
32 degree and, notwithstanding the provisions of Title 2C of the New
33 Jersey Statutes and subject to a fine of not more than \$15,000 or
34 imprisonment for not more than one year for a first offense, or both;
35 and by a fine of not more than \$30,000, or imprisonment for not
36 more than two years, or both, for a subsequent offense.

37 b. If the failure is done recklessly, guilty of a crime of the fourth
38 degree and, notwithstanding the provisions of Title 2C of the New
39 Jersey Statutes and subject to a fine of not more than \$10,000 or
40 imprisonment for not more than six months for a first offense, or
41 both; and by a fine of not more than \$20,000, or imprisonment for
42 not more than one year, or both, for a subsequent offense.

43 A complaint or indictment under the provisions of this section
44 may be brought either in the county in which the work was
45 performed or in the county in which the employer has a principal
46 place of business. In the case of an employer whose principal place
47 of business is outside the State, a complaint or indictment may be
48 sought in the county in which the work was performed.

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1 4. If the Commissioner of Labor and Workforce Development
2 determines, after investigation, that an employer or any officer,
3 agent, superintendent, foreman, or employee of the employer, or
4 staffing agency or temporary help services firm, employee leasing
5 company, employment agency or similar entity used by the
6 employer, has failed to properly classify an individual as an
7 employee in accordance with section 2 of this act and failed to pay
8 required wages, benefits, taxes or other contributions, or if a final
9 conviction and disposition of a violation of this act is made
10 pursuant to section 3 of this act, then the commissioner shall place
11 the employer on a list of employers who are prohibited from
12 contracting, directly or indirectly, with any public body for the
13 construction of any public building or other public work projects, or
14 from performing any work on the same, for a period of two years if
15 the failure is done recklessly and for a period of three years if the
16 failure is done knowingly. The commissioner shall give notice by
17 mail of that list to any public body who shall request the
18 commissioner so to do.

19 In the case of a determination by the commissioner, if the person
20 responsible denies that a failure to properly classify an employee
21 has occurred, he shall have the right to apply to the commissioner
22 for a hearing, which shall be afforded and a decision shall be
23 rendered within 48 hours of the request for a hearing. If the
24 commissioner rules against the petitioning party he shall have the
25 right to apply for injunctive relief in the Superior Court against the
26 listing by the commissioner.

27
28 5. A public body awarding any contract for public work, or
29 otherwise undertaking any public work, or entering into a lease or
30 agreement to lease pursuant to which public work is to be done,
31 shall first ascertain from the commissioner the list of names of
32 employers who have failed to pay prevailing wages as determined
33 in section 4 of this act, and no contract shall be awarded to such
34 employer, or to any firm, corporation or partnership in which such
35 employer has an interest.

36
37 6. The commissioner, in consultation with the State Treasurer,
38 shall make and promulgate rules and regulations necessary to
39 implement the purposes of this act.

40
41 7. This act shall take effect immediately.

42
43

STATEMENT

44
45
46 This bill provides that employers who knowingly or recklessly
47 improperly classify workers in the construction industry as
48 independent contractors for purposes of avoiding relevant
49 provisions of the law will be subject to criminal penalties and

1 debarment from public works contracts. The debarment from
2 public works contracts and the penalties may apply for a case of
3 misclassification of construction workers whether or not the
4 misclassification occurs in connection with public works projects.

5 With respect to the construction industry, the bill creates a
6 presumption that a work arrangement is an employer-employee
7 relationship, unless the party receiving the services can overcome
8 the legal presumption of employment by establishing that three
9 factors are present. An employer subject to the bill who fails to
10 properly classify an individual as an employee and instead classifies
11 them as an independent contractor will be subject to criminal
12 penalties.

13 An employer violates the provisions of the bill if it classifies or
14 treats a worker who does not meet each prong of the three pronged
15 test as an independent contractor. Thus the bill penalizes any
16 employer, or any officer, agent, superintendent, foreman, or
17 employee of the employer, or staffing agency or temporary help
18 services firm, employee leasing company, employment agency or
19 similar entity used by the employer who fails to properly classify an
20 individual as an employee and instead classifies them as an
21 independent contractor.

22 The bill states that employers who misclassify individuals as
23 independent contractors for purposes of avoiding relevant
24 provisions of the "New Jersey Prevailing Wage Act," the
25 "unemployment compensation law," the "Temporary Disability
26 Benefits Law," the "New Jersey Gross Income Tax Act," the
27 "workers' compensation law," or "New Jersey State Wage and Hour
28 Law," will be, if the misclassification is done knowingly, guilty of a
29 crime of the third degree and be punished by a fine of not more than
30 \$15,000 or imprisonment for not more than one year for a first
31 offense, or both, and by a fine of not more than \$30,000, or
32 imprisonment for not more than two years, or both, for a subsequent
33 willful offense, and if the misclassification is done recklessly, of a
34 crime of the fourth degree and punished by a fine of not more than
35 \$10,000, or imprisonment for not more than six months for a first
36 offense, or both, and by a fine of not more than \$20,000 or
37 imprisonment for not more than one year, or both for a subsequent
38 offense.

39 The bill requires the Commissioner of Labor and Workforce
40 Development to prevent an employer who has been convicted of a
41 violation from contracting, directly or indirectly, with the State or
42 any of its agencies, authorities or political subdivisions for the
43 construction of any public building or other public works, or from
44 performing any work on the same, for a period of three years for a
45 knowing violation or up to two years for a reckless violation.

SENATE LABOR COMMITTEE

STATEMENT TO

SENATE COMMITTEE SUBSTITUTE FOR **SENATE, Nos. 2579 and 2248**

STATE OF NEW JERSEY

DATED: MARCH 15, 2007

The Senate Labor Committee reports favorably a Senate Committee Substitute for Senate Bill Nos. 2579 and 2248.

This bill, a committee substitute for Senate Bill Nos. 2579 and 2248, creates a presumption that a work arrangement in the construction industry is an employer-employee relationship unless the party receiving the services can overcome the legal presumption of employment.

Employers who improperly classify employees as independent contractors in the construction industry deprive workers of proper Social Security benefits, and other benefits, which also reduce employers' State and federal tax withholding and related obligations. These practices put those employers in the construction industry who bear the higher costs of complying with the law at a competitive disadvantage. In this way, independent contractor misclassification undermines fair market competition in the construction industry.

Under the bill, services performed in the making of improvements to real property by an individual for remuneration are deemed to be employment unless and until it is shown to the satisfaction of the Department of Labor and Workforce Development that:

1. The individual has been and will continue to be free from control or direction over the performance of that service, both under his contract of service and in fact;
2. The service is either outside the usual course of the business for which the service is performed, or the service is performed outside of all the places of business of the employer for which the service is performed; and
3. The individual is customarily engaged in an independently established trade, occupation, profession or business.

Under the bill, an employer who fails to properly classify an individual as an employee shall be guilty of a disorderly persons offense and fined not less than \$100 nor more than \$1,000 or be imprisoned for not less than 10 nor more than 90 days, or both. Each week, in any day of which an employee is misclassified and each employee so misclassified, shall constitute a separate offense.

In any case in which the failure is done knowingly, the employer shall be:

(1) Guilty of a crime of the second degree if the construction contract amount is for \$75,000 or above;

(2) Guilty of a crime of the third degree if the contract amount exceeds \$2,500, but is less than \$75,000; and

(3) Guilty of a crime of the fourth degree if the contract amount is for \$2,500 or less.

In addition to any other sanctions provided by law, when the Commissioner of Labor and Workforce Development finds that an employer has violated the provisions of this bill, the commissioner is authorized to assess and collect administrative penalties, up to a maximum of \$2,500 for a first violation and up to a maximum of \$5,000 for each subsequent violation.

If the Commissioner of Labor and Workforce Development determines, after investigation, that an employer has knowingly failed to properly classify an individual as an employee, then the commissioner shall place the employer on a list of employers who are prohibited from contracting, directly or indirectly, with any public body for the construction of any public building or other public work projects, or from performing any work on the same, for a period of three years.

If the person responsible for the violation denies that a failure to properly classify an employee has occurred, he shall have the right to apply to the commissioner for a hearing in accordance with the "Administrative Procedure Act," which shall be afforded and a decision shall be rendered within 48 hours of the request for a hearing. The commissioner may bring an action in Superior Court to enjoin or invalidate any contract award made in violation of this provision.

If the commissioner determines that ordering an immediate suspension is in the public interest, the contractor is afforded an opportunity to contest the immediate suspension in the following manner:

(1) The commissioner shall notify the contractor in writing of the immediate revocation and the contractor's rights under this subsection.

(2) The contractor may notify the commissioner of its request for an opportunity to be heard and contest the immediate suspension in writing within 72 hours of its receipt of immediate suspension notification.

(3) Within seven business days of receipt of the notification from the contractor, the commissioner shall grant the contractor a hearing to contest the immediate suspension. The commissioner shall permit the contractor to present evidence at the hearing.

(4) The commissioner shall issue a written decision within five business days of the hearing either upholding or reversing the contractor's immediate suspension. The decision shall include the

grounds for upholding or reversing the contractor's immediate suspension.

(5) If the contractor disagrees with the written decision, the contractor may appeal the decision to the commissioner, in accordance with the "Administrative Procedure Act."

An order by the commissioner for the immediate suspension of a contractor's registration will have no effect on the registration of any contractor or subcontractor, regardless of tier, in the contractual chain with the suspended contractor.

For a second violation, the commissioner shall issue a stop-work order requiring the cessation of all business operations at every site at which the violation occurred within 72 hours of that determination. That order shall remain in effect until the commissioner issues an order releasing the stop-work order upon finding that the employer has properly classified the individual as an employee and has paid any required penalties.

For a third or any subsequent violation, the stop-work order would apply to all business operations of the violator.

Under the bill the commissioner may assess a civil penalty of \$5,000 per day against an employer for each day that it conducts business operations that are in violation of a stop-work order. The commissioner may also assess against an employer a civil penalty of \$5,000 for each individual who the employer failed to properly classify as an employee.

Finally, the bill provides that an individual employed as a construction worker who has not been properly classified as an employee may bring a civil action for damages against the employer or any other employer who was in contract with the employee, for failing to properly classify the employee if the employer had knowledge of the misclassification.

As reported, this Senate Committee Substitute is identical to Assembly Bill No. 4009 (2R).