

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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HOUSE BILL 790

Short Title: Enact Employee Fair Classification Act. (Public)

Sponsors: Representatives Glazier, Brandon, Ross, and Bordsen (Primary Sponsors).
For a complete list of Sponsors, see Bill Information on the NCGA Web Site.

Referred to: Commerce and Job Development.

April 7, 2011

1 A BILL TO BE ENTITLED
2 AN ACT AMENDING THE LABOR LAWS OF NORTH CAROLINA TO ENACT THE
3 EMPLOYEE FAIR CLASSIFICATION ACT.

4 The General Assembly of North Carolina enacts:

5 **SECTION 1.** Chapter 95 of the General Statutes is amended by adding a new
6 Article to read:

7 "Article 4.

8 "Employee Fair Classification Act.

9 "**§ 95-275. Title.**

10 This Article shall be known and may be cited as the "Employee Fair Classification Act."

11 "**§ 95-276. Definitions.**

12 The following definitions apply in this Article:

- 13 (1) Employee. – Any person or entity directly hired by, or directly permitted to
14 work by, an employer in the State for work to be performed wholly or partly
15 therein. This act applies to an employer who contracts to provide or perform
16 services, including construction and construction maintenance, with the State
17 or any political subdivision thereof.
- 18 (2) Employer. – Any individual, partnership, association, joint stock company,
19 trust, corporation, the administrator or executor of the estate of a deceased
20 individual, or the receiver, trustee or successor of any of the same,
21 employing any person. The term includes the State and its local political
22 subdivisions and any agency or instrumentality of the State. The term does
23 not apply to employees of the United States government or any political
24 subdivision thereof.
- 25 (3) Independent contractor. – An individual who performs services for an
26 employer and:
- 27 a. Has been and will continue to be free from control or direction by an
28 employer over the performance of the services, both under the
29 individual's contract of service;
- 30 b. The service is, in fact, either outside the usual course of the business
31 for which the service is performed or the service is performed outside
32 of all the places of business of the enterprise for which the service is
33 performed; and
- 34 c. The individual is customarily engaged in an independently
35 established trade, occupation, profession, or business.



- 1 (4) Knowingly. – Having actual knowledge of, or acting with deliberate
2 ignorance or reckless disregard for, the prohibition involved.
- 3 (5) Labor organization. – A labor union; an employee organization; a federation
4 of labor unions, groups, locals, or other employee organizations; or any other
5 organizations in which employees participate and that exist for the purpose,
6 in whole or in part, of dealing with employers concerning grievances, labor
7 disputes, wages, hours, and other terms and conditions of employment.
- 8 (6) Misclassification. – Wrongly designating an individual who performs
9 services for the employer as not an employee of the employer.
- 10 (7) Violate or violated. – Includes, but is not limited to, any intent to evade,
11 misrepresent, or willfully nondisclose the provisions of this Article.

12 **"§ 95-277. Presumption of employee status.**

13 (a) An "employer-employee" relationship shall be presumed to exist when work is
14 performed by an individual for remuneration paid by an employer. The party asserting that an
15 individual is not an employee must establish by a preponderance of the evidence that the
16 individual is an independent contractor.

17 (b) In making a determination whether an individual is an independent contractor
18 within the meaning of G.S. 95-278:

- 19 (1) An employer's failure to withhold federal or State income taxes with respect
20 to an individual shall not be a factor considered by the court; and
- 21 (2) The court shall determine that an individual is an employee if the control
22 exercised by the party paying remuneration to the individual is general in
23 nature and is exercised directly or indirectly over the physical activities of
24 the individual. It is not necessary for the amount of control to extend to all
25 the details of the physical performance of the duties performed by an
26 individual for an employer to consider the individual an employee of the
27 employer.

28 **"§ 95-278. Prohibited conduct.**

29 (a) An employer shall not improperly classify an individual who performs work for
30 remuneration provided by an employer as an independent contractor.

31 (b) An employer has improperly classified an individual when an employer-employee
32 relationship exists, but the employer has not classified the individual as an employee.

33 (c) A person shall not incorporate or form, or assist in the incorporation or formation of,
34 a corporation, partnership, limited liability corporation, or other entity, or pay or collect a fee
35 for use of a foreign or domestic corporation, partnership, limited liability corporation, or other
36 entity for the purpose, in whole or part, of facilitating, or evading detection of, a violation of
37 this section.

38 (d) No person shall require or request an individual to enter into an agreement or sign a
39 document that results in the misclassification of the individual as an independent contractor or
40 otherwise does not accurately reflect the individual's relationship with an employer.

41 (e) A person shall not knowingly conspire with, aid and abet, assist, advise, or facilitate
42 an employer with the intent of violating the provisions of this Article.

43 **"§ 95-279. Prohibited retaliation.**

44 (a) No employer or any agent of an employer shall retaliate through discharge, or in any
45 other manner, against any individual for exercising any rights granted under this Article.

46 (b) No employer shall retaliate against an individual if the individual does any of the
47 following:

- 48 (1) Makes a written or verbal complaint to an employer or to a federal or State
49 agency or at a public hearing, stating that provisions of this act allegedly
50 have been violated, or otherwise opposes any practice made unlawful under
51 this Article.

1 (2) Causes to be instituted any proceeding under or related to this Article.

2 (3) Testified or prepared to testify, assisted or participated in any manner in an
3 investigation or proceeding under this Article.

4 (c) No employer shall attempt to cause or cause an individual to waive the provisions of
5 this act or to enter into a predispute agreement which waives the right to a trial by jury.

6 **"§ 95-280. No waivers by agreement.**

7 Except as provided in this Article, no provision of this Article may in any way be waived,
8 contravened, or set aside by private agreement, including the right to a private cause of action.

9 **"§ 95-281. Causes of actions for certain violation; relief; jury trial.**

10 (a) An individual, interested party, or labor organization aggrieved by a violation of
11 G.S. 95-278 or G.S. 95-279 may commence a civil action on its own behalf or on behalf of any
12 other individual who is similarly situated to the aggrieved individual, interested party, or labor
13 organization.

14 (b) A civil action pursuant to this section must be brought within three years after the
15 occurrence of the alleged violation of the applicable sections of this Article. The three-year
16 period is tolled if the employer has deterred the ability of an individual to bring an action under
17 this section.

18 (c) An action commenced pursuant to subsection (a) of this section may be brought in
19 the State court in the county where the alleged violation occurred, the county where the
20 complainant resides, or the county where the employer against whom the civil complaint is
21 filed resides or where the employer's principal place of business is located.

22 (d) For purposes of this section, each violation of G.S. 95-278 or G.S. 95-279
23 constitutes a separate violation for each individual involved and for each day the violation
24 continues.

25 (e) The party commencing an action pursuant to subsection (a) of this section shall have
26 the right to a trial by jury or before the court, at its election at the time it commences its civil
27 action.

28 (f) If a court or a jury in a civil action brought pursuant to this division determines that
29 a violation of G.S. 95-278 or G.S. 95-279 has occurred, the court shall award to the plaintiff all
30 of the following:

31 (1) The amount of any wages, salary, employment benefits, or other
32 compensation denied or lost to an individual by reason of the violation, plus
33 an equal amount in liquidated damages, provided, however, that said
34 liquidated damages shall equal double the amount of wages due for each
35 violation of this act for each violation that was knowingly committed.

36 (2) Compensatory damages.

37 (3) All equitable, including injunctive, relief that the court determines to be
38 appropriate.

39 (4) Attorneys' fees and costs.

40 **"§ 95-282. Burdens of proof.**

41 (a) In making a determination whether an individual is an independent contractor
42 within the meaning of G.S. 95-278 or G.S. 95-279, an employer's failure to withhold federal or
43 State income taxes with respect to an individual shall not be a factor.

44 (b) In making determinations under this section, the court shall determine that an
45 individual is an employee if the control exercised by the party paying remuneration to the
46 individual is general in nature and is exercised directly or indirectly over the physical activities
47 of the individual. It is not necessary for the amount of control to extend to all the details of the
48 physical performance of the duties performed by an individual for an employer to consider the
49 individual an employee of the employer.

50 **"§ 95-283. Notices.**

1 If an employer engages an individual to perform services and that individual is not
2 considered by the employer to be an employee pursuant to G.S. 95-278, that employer shall
3 post and keep posted, in a conspicuous place on each job site where that individual performs
4 services and in each of the employer's offices in the State, in English and Spanish, the
5 following notice:

6 (1) Every individual working for a contractor has the right to be properly
7 classified by the contractor as an employee rather than an independent
8 contractor if the individual does not meet the requirements of an independent
9 contractor under the law known as the Employee Fair Classification Act.

10 (2) If you believe you or someone else has not been properly classified as an
11 employee or an independent contractor under the Employee Fair
12 Classification Act, you have the right to challenge this classification by
13 bringing an action in State civil district court."

14 **SECTION 2.** This act is effective when it becomes law and applies to employment
15 existing on or after that date.